IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6575

ROBERT PAUL LYTLE, Petitioner

-vs-

THE STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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and

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Admitted to Practice
Before this Court

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner, Robert Paul Lytle, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered December 27, 1976, rehearing denied January 20, 1977.

I. OPINIONS

The opinion of the Court of Appeals of Greene County, Ohio, Second Appellate District, State v. Lytle is not reported, but the unreported opinion is attached as Appendix A.

The opinion of the Supreme Court of the State of Ohio, State v. Lytle, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1976), is attached as Appendix B. The judgment and order of the Ohio Supreme Court dated December 27, 1976 and the judgment denying rehearing, dated January 20, 1977, are attached as Appendix C and D, respectively.

II. JURISDICTION

The date of the judgment of the Supreme Court of Ohio which this petition seeks to have reversed is December 27, 1976, rehearing denied January 20, 1977. (Appendices C and D).

This Court has jurisdiction to review the judgment of the

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Supreme Court of Ohio pursuant to 28 U.S.C. §1257(3).

III. QUESTIONS PRESENTED

1. Is the standard of competency of Counsel in a criminal case, especially when the death penalty is a possibility, whether it be retained or appointed Counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Counsel "reasonably likely to render and rendering reasonably effective assistance", and isn't the petitioner prejudiced by the application of a lesser test based upon the due process/fair trial standard?

2. Is the test of competency of Counsel as set out by the Ohio Supreme Court, being whether a "fair trial and substantial justice" was done, unfair and contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States guaranteeing effective assistance of Counsel, when the Petitioner has the burden of proof to show there has been a substantial violation of any of Defense Counsel's essential duties to his client and must further show prejudice thereby?

3. Is the Petitioner denied his right to effective assistance of Counsel when defense counsel in an aggravated murder case fails to properly investigate the facts of the case, fails to comply with discovery procedure, fails to do adequate research, fails to be prepared to put on a case at the end of the state's case in chief, conveys to the defendant the false impression that he can "win" the case thus destroying a fair plea bargain, fails to have a proper grasp of the law, fails to make a competent closing argument, misrepresents to the Court as to his "retained" status, handles a legal matter which he knows or should know that he is not competent to handle, fails to raise proper objections to improper evidence, and fails to make proper constitutional objections to an illegal search and seizure and the fruits thereof?

4. Is Petitioner denied a fair trial when the Prosecution

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for purpose of proving a scheme, plan or system, introduces testimony, over objection, concerning other crimes not inextricably related to the crime charged?

5. Is the Petitioner denied a fair trial and his Fourth Amendment guarantees against general exploratory searches by the introduction of evidence seized in the search of the Defendant's car, when none of the contents seized pursuant to a Search Warrant were described in the Search Warrant and when the entire movable contents of the Defendant's car were seized?

6. Does the imposition and carrying out of Petitioner's death sentence violate the Eighth or Fourteenth Amendments to the Constitution of the United States?

IV. CONSTITUTIONAL PROVISIONS

1. This case involves the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law: Ohio Revised Code 2903.01, 2929.02, 2929.03, 2929.04, and 2945.59. These sections are set out in full in Appendix E.

V. STATEMENT OF THE CASE

Robert Paul Lytle was indicted by the Grand Jury on September 13, 1974, along with Charles Ellsworth White and David Wesley Arrasmith, for purposely causing the death of Wallace R. Archibald while committing kidnapping or aggravated robbery or while fleeing immediately after committing said offenses. The Grand Jury further found and specified that the offense was committed for the purpose of escaping detection; the offense was committed while the offender was committing or attempting to commit the crime of kidnapping; and the offense was committed while the offender was fleeing immediately after committing aggravated robbery, contrary to Section 2903.01 of the Ohio Revised Code.

Defendant was appointed defense counsel on October 2, 1974, arraigned that day and entered a plea of "Not Guilty" to the

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charges contained in the Indictment.

On October 23, 1974, defense counsel moved the Court to suppress all statements made by the defendant in that he was not properly advised and was not aware of his rights against self-incrimination. Counsel also moved the Court to suppress certain evidence taken by the County Sheriff's Department in an "illegal" search of defendant's car.

The Court overruled both motions.

On October 29, 1974, the Court heard three (3) motions of defendant, to wit: Motion for Change of Venue; Motion for Bill of Particulars; Motion for a Continuance. Those three (3) motions had been filed by Rodney Keish, another attorney, without the consent or knowledge of appointed counsel, Larry Morris. Thereupon, Mr. Morris asked the Court to permit him to withdraw from the case because counsel felt he could not cooperate with Mr. Keish and that the defendant, heretofore indigent, had "retained" Mr. Keish. (R. 2-5, 14-16). Mr. Keish also had filed a Writ of Mandamus with the Court of Appeals to compel the Sheriff to allow him to see "his client". (R. 4). The Court granted the request of Mr. Morris, and Mr. Keish was approved as counsel of record, as having been retained by defendant. Dennis Sipe was also approved as co-counsel. Mr. Sipe and Mr. Keish were both Public Defenders at the time for the Greene-Clinton County Public Defender Project. The Court granted the Motion for a Bill of Particulars (R. 21) and further granted a two (2) day continuance (R. 20) setting the trial nine (9) days away instead of seven (7), but overruled counsel's Motion for Change of Venue. (R. 23).

The trial of defendant commenced November 7, 1974. Defendant requested trial by jury. At the end of the State's case, defense counsel rested without presenting any evidence. The jury returned a verdict, November 25, 1974, of "Guilty" as to the crime and all three (3) specifications included within the Indictment.

A hearing was subsequently held on January 6, 1975, to

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review the reports of two (2) Court appointed psychiatrists, and the Adult Probation Authority, to hear defense witnesses, and to find if there were any mitigating circumstances, pursuant to Ohio Revised Code 2929.03(D), relative to the penalty which should be imposed upon the offender. The Court ruled, however, that those mitigating circumstances were not present and defendant was sentenced to the electric chair (R. 64-65).

On February 20, 1975, the Court appointed James F. Cox, Xenia, Ohio, as attorney for defendant in that defendant was indigent. Mr. Keish was asked to withdraw from the case at that time. A timely appeal was brought by the appointed attorney.

Six (6) Assignments of Error were taken to the Court of Appeals. The Court affirmed the lower Court's decision, rejecting the contentions that the defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. The Appellate Court refused to consider defendant's arguments that the search and seizure of the defendant's car was in violation of the Fourth Amendment of the United States Constitution, and that the defendant was denied his rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments in that his counsel, though not incompetent, failed to raise timely objections and thus waived those objections. Thereupon a timely notice of appeal was filed by appointed counsel in the Supreme Court.

The Ohio Supreme Court rendered judgment in this matter, affirming the lower Court's decision, on December 27, 1976, which rehearing was denied on January 20, 1977. A copy of the Court's reported opinion is attached as Appendix B.

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VI. ARGUMENT

1. Is the standard of competency of Counsel in a criminal case, especially when the death penalty is a possibility, whether it be retained or appointed Counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Counsel "reasonably likely to render and rendering reasonably effective assistance", and isn't the petitioner prejudiced by the application of a lesser test based upon the due process/fair trial standard?

The Sixth Amendment guarantees that a criminal defendant shall enjoy the right "to have the assistance of counsel for his defense". This guarantee was first interpreted by the Supreme Court to mean the "effective" assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1932). In Glasser v. United States, 315 U.S. 60 (1942), the Court stated that an inadequate performance by counsel would render a conviction void.

Following Gideon v. Wainwright, 372 U.S. 335 (1963), the courts have moved toward the civil malpractice standard of incompetency. The Third Circuit in Moore v. United States, 432 F.2d 730 (3rd Cir. 1970), rejected the old "farce and mockery" standard of justice, and adopted the standard of normal competency. The Moore Court cited the ABA Standards Relating to Providing Defense Services which state, inter alia, that, "It is implicit that representation should be adequate to the need". These standards state that counsel should have experience commensurate with the seriousness of the charge. The Eighth Circuit in McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), also has adopted the ABA Standards as appropriate assistance to judge ineffective counsel.

The Fifth Circuit followed the lead of the Third Circuit in the case of Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974). In Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969), the Seventh

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Circuit followed the new standard of competency test. The Wilson Court abolished the distinction between retained and appointed counsel as had Moore and Hudson, and based its decision on the Sixth and the Fourteenth Amendments. Likewise, see West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973). In 1967, the District of Columbia Circuit Court in Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967) adopted the new standard. This decision was reaffirmed in Scott v. United States, 138 U.S. App. D.C. 339, 427 F.2d 609, 610 (1970).

In Ohio, the Sixth Circuit has recently laid down a reasonable competency standard in Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). The Sixth Circuit held:

> "The assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must, conscientiously, protect his client's interest, undeflected by conflicting considerations. Defense counsel must investigate all, apparently, substantial defenses available to the defendant and must assert them in a proper and timely manner." 491 F.2d 696

The Beasley case is clearly the leading case in the area of incompetency of counsel.

It is evident that some blunders by counsel would be incompetent under both standards, the old farce and mockery standard or the reasonable competency standard.

The Ohio Courts in State v. Cocco, 73 Ohio App. 182 (1943), and State v. Cutcher, 17 Ohio App. 2d 107 (1969), have provided examples as to what amounts to incompetency of counsel under the due process or farce and mockery standard. More importantly, the Cocco Court stated:

> "A man on trial for his life, his most valuable possession, the most sacred of his guaranteed rights, is entitled to strict compliance to the rules of law, regardless of the probability or his proof of his guilt.: (Page 188).

Policy considerations are quite important here also. It is

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certainly not inconceivable that lawyers should be held to a reasonable competency standard as other professionals, such as doctors.

In the case of United States v. Decoster, 487 F.2d 1197 (CA DC 1973), the Court found that the defense counsel's choices for his client were uninformed because of inadequate preparation and these in effect denied the client his Sixth Amendment rights.

It should also be noted that the standard of effective counsel as first interpreted in the Gideon case may require effective counsel to mean more than an inexperienced attorney in a murder case. This statement may be negated if such attorney has had sufficient experience so that he would be a reasonably competent criminal attorney. However, the adversary system is surely thwarted when one side in incompetent.

The Ohio Supreme Court in State v. Hester, 45 Ohio St.2d 71 (1976) has stated that the test of competency of counsel is whether the accused under all circumstances had a fair trial and substantial justice was done. This test is based on the due process/fair trial standard as used by the Courts prior to the Moore and Beasley cases. As stated in Beasley, supra, p. 694: "It was to the guarantee of a fair trial, not the Sixth Amendment that the "farce and mockery" standard was applied." Such a test ignores the right to counsel as guaranteed by the Sixth Amendment and only looks to the end result to see if "substantial justice was done." A man on trial for his life must receive adequate counsel. It is unfair and contrary to the Sixth Amendment directives to examine the verdict to see if the accused had a fair trial without looking to see if his representative was competent regardless of the result. How can an Appellate Court, viewing a record, even expect to find ineffective assistance of counsel by beginning its examination with a jury verdict? The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount

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of prejudice arising from its denial. The application of this lesser standard of competency of counsel and a review of the record is mandated by this Court.

2. Is the test of competency of Counsel as set out by the Ohio Supreme Court, being whether a "fair trial and substantial justice" was done, unfair and contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States guaranteeing effective assistance of Counsel, when the Petitioner has the burden of proof to show there has been a substantial violation of any of Defense Counsel's essential duties to his client and must further show prejudice thereby?

The Ohio Supreme Court in Lytle developed a two-step process when considering an allegation of ineffective assistance of counsel. First, there must be a determination as to whether there had been a substantial violation of any of defense counsel's essential duties to his client. The Court did not delineate those duties nor give any clues as to what a "substantial" violation would be. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. The Court placed the burden of proof on the defendant for reason that a licensed attorney is presumably competent.

It is evident that the Ohio Supreme Court has determined that even if there were a Sixth Amendment violation, and substantial violation of counsel's duties to his client, that if a fair trial were had, the defendant would have no recourse. This approach cheapens the right to counsel and completely ignores the reason for the Sixth Amendment. The day is long past when a violation of a fundamental constitutional right may be swept away on the basis that there was no prejudice. It is inconceivable for a Court to make this type of determination at such a late date.

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How can they know what a competent counsel could have done at a trial?

Such a test of competency of counsel is unfair to the petitioner and mandates review by this Court.

3. Is the Petitioner denied his right to effective assistance of Counsel when defense counsel in an aggravated murder case fails to properly investigate the facts of the case, fails to comply with discovery procedure, fails to do adequate research, fails to be prepared to put on a case at the end of the state's case in chief, conveys to the defendant the false impressession that he can "win" the case thus destroying a fair plea bargain, fails to have a proper grasp of the law, fails to make a competent closing argument, misrepresents to the Court as to his "retained" status, handles a legal matter which he knows or should know that he is not competent to handle, fails to raise proper objections to improper evidence, and fails to make proper constitutional objections to an illegal search and seizure and the fruits thereof?

ABA Standards, Defense Function 4.1, states that:

> 4.1 Duty to investigate.
>
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.

Further, Rule 4.5 states:

> 4.5 Compliance with discovery procedure.
>
> The lawyer should comply in good faith with discovery procedures under the applicable law.

It is evident from the record that defense counsel did not make proper investigation, nor comply with discovery procedure. (R. 556-558, 1102, 1105-1106, December 18 hearing R. 8, R. 9-10).

It is not even evident defense counsel knew the correct discovery procedure. The record shows at R. 556-557:

MR. KEISH: I would object to the introduction of any photographs into evidence, the basis being photographs have not been seen by either defense counsel prior to Court today, and therefore, there has been a failure of discovery. Also, the photographs

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were marked for identification without the defense counsel's knowledge and we reserve the right to object to further introduction of the photos on relevancy and being inflammatory.

THE COURT: All right, now, the photographs have been marked and you had the right, and the Court will take note of the fact that you had the right of inspection this morning. Now, if you want further examination of those, the Court will permit that at this time. They haven't been introduced into evidence at this time, they have been marked for identification.

MR. KEISH: Yes, we will examine them.

THE COURT: All right, examine them further then.

MR. CARRERA: Your Honor, while he is examining, the State does have a position on the matter. Number one, is what the Court has already indicated, that we have not offered them as yet, but at the conclusion of this witness' testimony, we will offer them, so we might as well meet his other argument at this time. The State of Ohio, has, from the beginning of these case, indicated in open Court to this Court and to defense in all three of these cases, that no evidence would be withheld, that we had an open policy. I know for a fact that the three defense counsels originally appointed by this Court went by special arrangement to BCI to view the evidence we had at BCI. I know for a fact that Larry Morris had the coroner's report before I did, because I made arrangements with the coroner to pick it up direct, and he walked to the jail on three different occasions and got it actually in advance of the prosecution. I know for a fact that Larry Morris went over to the detective section and that they opened the file to him on anything they had in the file, which included the fact that we had these photographs. We have never refrained from showing these to anyone. Had we been asked, they would have been gladly turned over to defense counsel well in advance of this trial. Let the record show that we were never asked by defense counsel in this case at this time.

MR. KEISH: One thing further, let the record show that the defense counsel one or two or maybe three days prior to today made a motion in open Court to see any and all physical evidence that might be produced in this trial.

MR. CARRERA: Your Honor, we concur in that and we told them in open Court at that time that apparently somebody is mixed up on who has what duty, they have to come and ask to look at them, and we have never had them come over and ask to look at them.

The Court itself became bothered by the lack of discovery on defense counsel's part. The record shows at 1105-1106:

THE COURT: Well, it would appear to the Court that the defendant has a right to waive any constitutional right that he has under certain conditions. I am bothered somewhat about this question of discovery.

MR. CARRERA: Well, your Honor, all we did was tell them the whole file was open and to go to the jail and look at it, and I did not go with them, so I cannot testify that each paper was taken out and viewed, but anything they wanted was made available.

Elementary to the preparation of a criminal case, especially an aggravated murder case, is adequate investigation and research.

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The record adequately shows, however, counsel was not prepared for trial. However, as late as December 18, 1974, at the hearing on the motion for a new trial, defense counsel Keish admitted:

MR. KEISH: It wasn't until that day, in open Court, and on the record, Larry Morris, on October 29th, at the hearing on the three motions, handed me, in the presence of the Prosecutor and the Court, the file, and stated to the Court and the Prosecutor that I had not seen that file before that day. I had no idea, therefore, without seeing the file, who the witnesses were going to be, what the evidence was. In fact, because of the lack of discovery, defense counsel did not know until most evidence was introduced, at trial, what evidence was going to be presented.

Further, defense counsel rested without putting on any evidence (R. 1122).

To summarize his preparation for the case, counsel further stated in the December hearing: (R. 9-10)

MR. KEISH: I think the record in this case is self-evident that defense counsel was not prepared for trial and that more time was certainly needed, and I certainly would state for the record at this time, your Honor, that defense counsel certainly feels that there was not adequate time to prepare for this trial, and we also feel that we were not prepared when the trial took place.

THE COURT: Mr. Sipe, do you agree?

MR. SIPE: Yes.

MR. KEISH: Defense counsel did not even know who half the witnesses were, even after they received their names, let alone know what they were going to testify about. Defense counsel certainly did not know when the witnesses would testify until they were called to the stand, and, as stated before, some of the witnesses were called even without notifying the defense that they would be called until right before they took the stand.

Defense counsel tried desperately to talk to some possible witnesses, but unfortunately, never did have -- defense counsel tried to talk to some possible defense witnesses, but, unfortunately, never did have enough time to prepare even one witness for trial.

Three witnesses vital to the defense of this trial were not even found until the last day of trial because they lived in Akron, Ohio, and subsequently, defense was not able to talk with them, simply because of the lack of time and simply because of a lack of time to evolve defense strategy for presentation of their testimony.

At the same time defense counsel was forced to trial, he also was burdened by a typical Public Defender case load which could not be neglected. During those nine days before trial, counsel was forced to move cases up and try to dispose of them before trial or continue them until after trial. Counsel also appeared in two County Courts, which meet in the evening on Tuesday and Wednesday during the course of this trial. One whole day of the nine days before trial was taken up by a trip to Perry County to investigate what took place there when the Defendant was arrested. During those nine days -- I don't want this to sound like a sob

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story -- but the defense counsel was also in the process of moving from one apartment to another, and this could not have been avoided since my lease expired on the apartment which I was renting.

Counsel rested at the end of the state's case in chief simply because he was not even prepared to put on a case. Under any standards of competency, especially in a capital offense, said conduct was incompetent and deprived the defendant of a fair trial. More simply, however, the defendant was deprived of any trial.

Counsel was also incompetent in advising his client as to the outcome of the case. It is apparent from the record that counsel had conveyed to the defendant the idea that he could "win" the case. At the October 29 hearing on defense counsel's motion for a continuance, bill of particulars, and change of venue, the following dialogue took place as the Court entertained the request of Mr. Morris, the Court-appointed counsel, to withdraw from the case.

MR. LYTLE: Your Honor, the only thing I have to say about this is that Mr. Morris is a pretty good attorney, and so is Mr. Keish, and I would like to have them both, but Mr. Keish, I feel, can handle this case a little bit better than Mr. Morris because Mr. Morris doesn't feel that he can win this case, he has made that statement to me over the past few weeks, and I don't want to go into Court with that feeling.

MR. MORRIS: Your Honor, the statement I believe I made was that I thought that the State had a doggone good case, isn't that right, Robert?

MR. LYTLE: Yes

MR. MORRIS: And we were fighting an uphill battle as the State's case was so strong, and I think Mr. Lytle will back me up, that I made those statements to him in discussing the plea-bargaining that we were discussing previously. I wanted him to see the worst side of the case, so that he could make up his mind and look at it in the worst way, not thinking that the thing would come out that way, but I wanted him to be fully aware of the worst evidence and the worst side of the case so that he knew what he was talking about. Isn't that correct?

MR. LYTLE: That's the way I remember it.

However, Mr. Keish, in the December hearing stated that he had not really investigated the issues at that time. The record (R. 7) shows that:

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MR. KEISH: Finally, the Defendant was denied counsel on or about -- and/or the effective assistance of counsel on or about October 29, 1974 when the Defendant was denied a continuance in order to adequately prepare for trial. The Defendant feels that the denial of the continuance asked for on October 29, 1974, resulted in a denial of counsel, and a denial of adequate and effective assistance of counsel for the following reasons:

As counsel for the Defendant has learned since that hearing held on October 29, 1974, at which time Larry Morris withdrew his counsel, that the Defendant, Robert Paul Lytle, was never given notice that his attorney, Larry Morris, planned to withdraw from the case. The first time that the Defendant ever knew of Mr. Morris' intentions was when Mr. Morris withdraw in open Court on October 29, 1974, without ever telling Defendant that he was going to withdraw, and co-counsel also was not aware that Mr. Morris planned on withdrawing that day and, to say the least, was surprised beyond belief when he did withdraw. It was not until that day that I ever saw the file in this case, October 29th, nine days before trial. I had no idea who the witnesses were going to be, what the evidence was; in fact, because of the lack of discovery, defense counsel did not know --

The record shows (R. 16) on October 23, 1974, that there had been plea-bargaining through appointed counsel, Mr. Morris. However, Mr. Keish, retained counsel, had convinced Mr. Lytle that he could "win" the case, and thereupon Mr. Morris withdrew from the case. On the basis of Mr. Keish's information of the case at that time, quite obviously such advice, or any advice, was incompetent.

To be competent, a lawyer should obviously have a proper grasp of law. To try an aggravated murder case, even more should be required. Although not incompetent as specific examples, the following parts of the record tend to show that counsel did not understand elementary principles of criminal law.

a. Concept of Hearsay: (R. 708, 745-747)
b. Concept of Impeachment: (R. 861-866)
c. Concept of Cross-examination: (R. 890-891)
d. Concept of Adverse Witness: (R. 1016-1018)
e. Scope of Recall: (R. 1030-1031)
f. Concept of Sixth Amendment: (R. 1049)
g. Concept of Jury Instructions: (R. 1124)
h. Badgering Witnesses: (R. 590-616, 849-948, 1035)

The Court is urged to carefully consider here the extent of Mr. Keish's grasp of the law.

In the December hearing, Mr. Keish summarized some of his apprehensions about the case (R. 11):

Defense counsel was always under the impression that a

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neurological exam was to be performed upon the Defendant, yet none was ever performed. This, we feel, could have been vital to the defense after talking with the doctor, Dr. Hunt, in Columbus, who placed the plate in Defendant's head, but by the time we were aware that none had been performed, it was too late to get one, even though Dr. Hunt strongly suggested that we have one performed.

One other thing that must be pointed out, and that is the fact that defense counsel, between them, had a total of three years experience. I have been practicing two years and Mr. Sipe one. This, in itself, makes things that would seem rather simple and relatively easy for an experienced attorney, a monumental task for us as inexperienced lawyers.

All of this would have been much different, also, if we would have had the services of an investigator, but unfortunately, we did not, and at the same time we were responsible for covering two counties without the help of any other attorneys, like some law firms, since our whole program consists of myself and Mr. Sipe and one full-time and one part-time secretary. Also, during the middle of the trial, our full-time secretary was hospitalized due to an accident which severely cut veins and nerves in her right arm, and was absent for the remainder of the trial.

Although defense counsel presented no evidence, his closing argument to the jury took the offensive. To present such a defense as "accident", to negate the mens rea of aggravated murder, is appropriate. However, to argue such in a closing statement, without ever having presented evidence to support the inference is clearly unprofessional and incompetent.

The record read as a whole can give the reader no other opinion than that the trial was a "mockery of justice" by any standard. The appellate court should also note DR 6-101 (A) of the Code of Professional Responsibility, which states:

> (a) A Lawyer shall not:
>
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
> (2) Handle a legal matter with preparation adequate in the circumstances.

Clearly, counsel violated the Canons as well. Further, counsel's actions did not satisfy the Ohio test laid down in Hester, supra. The record also demonstrates that defense counsel purposely misrepresented to the Court that he had been "retained" by the defendant and therefore deprived the defendant of the benefit of experienced counsel (Dec.16, R. 21-22). The Court erred in accepting the change of counsel without proper investi-

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gation (October 29, R. 17). Indeed, as Public Defender, counsel could not even take criminal cases except by appointment. Such substitution resulted in an inexperienced attorney replacing an experienced attorney, and defendant, whose life was in balance, with less than he started.

4. Is Petitioner denied a fair trial when the Prosecution for purpose or proving a schema, plan or system, introduces testimony, over objection, concerning other crimes not inextricably related to the crime charged?

The lower Court erred in allowing into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue, constituting prejudicial error pursuant to Ohio Revised Code Section 2945.59. Specifically, the Court admitted into evidence a confession of the defendant and other testimony by witnesses which contained evidence of prior bad acts, breaking and enterings and burglaries of the defendant, unrelated to the crime of aggravated murder of which he was charged. The record shows that such admissions were frequent and unambiguous.

The Ohio Supreme Court recently reviewed the admissibility of prior bad acts or crimes under ORC 2945.59 in State v. Burson, 38 Ohio St. 2d 156 (1974). The Court stated that ORC 2945.59 operates as an "exception to the general rule that the introduction of evidence tending to show that the accused has committed any crime unconnected with the offense for which he is on trial is not permitted." Evidence of prior bad acts is admissible under ORC 2945.59 only if it tends to show one of the matters enumerated in the statute and "only when it is relevant to proof of the guilt of the defendant or the offense in question". Accordingly, the Court in Burson ruled that the error in admission of such evidence "constituted prejudicial error", and so denied the defendant due process of law. See also State v. Hector, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

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Clearly, defendant's admissions of prior bad acts contained within the confession as to breaking and enterings, committed prior to arriving at the bar to first meet the deceased Archibald, had nothing to do with any "scheme, plan, or system" of committing the alleged murder. They also could have no bearing as to proof of guilt of the defendant under the aggravated murder charge. Inadmissibility under ORC 2945.59 must be strictly construed against the State. See State v. Strong, 119 Ohio App. 31, 196 N.E.2d 801 (1963).

Although the Lytle decision stated that this evidence of prior bad acts was error, the court found that the error was harmless because there was no reasonable possibility that the testimony contributed to the defendant's conviction. It is a denial of the petitioner's right to a fair trial when such a determination is made at all and especially by the Supreme Court reviewing a transcript. How does the Supreme Court know what prompted the jury to find as it did? Is it not a reasonable possibility that evidence of burglaries contributed to at least the specifications? Such an approach mandates review by this Court.

5. Is the Petitioner denied a fair trial and his Fourth Amendment guarantees against general exploratory searches by the introduction of evidence seized in the search of the Defendant's car, when none of the contents seized pursuant to a Search Warrant were described in the Search Warrant and when the entire movable contents of the Defendant's car were seized?

The lower Court erred in admitting into evidence articles seized in the search of defendant's automobile pursuant to a Search Warrant, since the seizure violated the rules against general exploratory searches. The murder weapon was seized in this manner. The Court noted all the articles taken in the search by examining the inventory (R. 43-10/23/74). The inventory, attached to defendant's motion filed October 18, 1974, shows the items taken.

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The Sheriff seized every movable object within the car, none of which was named in the Search Warrant. Elementary in the protections afforded by the Fourth Amendment of the United States Constitution is the protection against general exploratory searches. The Fourth Amendment requires that the warrant particularly state what is to be seized. See Marron v. United States, 275 U.S. 192 (1927), and United States v. Lefkowitz, 285 U.S. 452 (1932).

The Ohio Supreme Court in Wacksman v. Harrell, 174 Ohio St. 338, 341, 189 N.E.2d 146 (1963) stated that "a search warrant permits only that property which is described therein with reasonable certainty to be seized; it does not authorize indiscriminate seizure of property found on the premises". The Ohio Rules of Criminal Prodecure in Rule 41(B) also cover property which may be seized with a warrant. The Rule states:

> "A warrant may be issued under this rule to search for and seize any; (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, of things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed."

The Fourth Amendment requires both particularity and probable cause. The Search Warrant was directed to articles stolen from a laundromat and a high school. None of the articles seized were relevant to the Search Warrant.

The judicial remedy for such an indiscriminate procedure is the exclusionary rule. See United States v. Lefkowitz, supra, Wacksman v. Harrell, supra, and Kremen v. United States, 353 U.S. 346 (1957).

Clearly the indiscriminate seizure of all the contents of the car, from a battery cable to a CPO jacket, without a proper Search Warrant for any of these articles, rendered the search illegal pursuant to the Kremen rationale. The proper remedy is exlusion of all evidence seized in the search.

The record shows that defendant was prompted into con-

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fessing due to the gun being held and represented to him as evidence. The Supreme Court has stated explicitly in Fahy v. Connecticut, 375 U.S. 85 (1963), that a confession or admissions induced by illegally seized evidence is not admissible in a criminal trial. The general principle is stated in Ohio Jurisprudence 2d, Criminal Law, Section 179, in pertinent part:

> 179. Scope and Extent of Exclusionary Rule; Use of Improperly Obtained Evidence for Impeachment Purposes.-It is clear that any evidence seized from the defendant in a criminal case in violation of his rights under the Fourth Amendment, prohibiting unreasonable searches and seizures, is inadmissible at his trial, and the fruits of such evidence are inadmissible as well.

It is clear that the defendant has standing to invoke the exclusionary rule. See Ohio Jurisprudence 2d, Criminal Law, Section 180. Clearly, should the Court hold that the search of defendant's car was illegal, then the confession, which assuredly was induced by knowledge that such evidence would probably be admitted in trial, must be excluded.

6. Does the imposition and carrying out of Petitioner's death sentence violate the Eighth or Fourteenth Amendments to the Constitution of the United States?

It is apparent from reading Appendix __E__, the Ohio death penalty statutes, that Ohio's death sentence scheme, as construed and applied in the case at bar, is unlike any of the three schemes upheld by this Court last year in the second round of death penalty cases. The categories of mitigating factors recognized by Ohio Rev. Code §2929.04(B) are sparse, and the Ohio Supreme Court's application of the duress factor has been excessively narrow and restrictive; there is no jury participation in the sentencing decision; the defendant bears the burden of establishing at the mitigation hearing that he should not be executed; and the review accorded death sentences by the Ohio Supreme Court is undiscriminating, as is demonstrated by even a cursory glance at the decision below.

Resolution of these issues, however, cannot be confined

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to the case at bar, for what is involved is not merely how Ohio's law was applied in the isolated setting of a single case, but also the rationality, fairness, and basic decency of the entirety of Ohio's statutory scheme as applied by the Ohio Supreme Court in a wide range of cases. Gregg v. Georgia, 96 S. Ct. 2909, 2938, (1976). A consideration of Ohio's law from this broader perspective will reveal that although Ohio's law is not identical to the North Carolina and Louisiana laws invalidated in Woodson v. North Carolina, 96 S. Ct. 2978 (1976); and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), it affronts the very concerns underlying those cases, and therefore raises the most substantial constitutional questions.

(1) Constitutional Insufficiency of Ohio's Law of Mitigation. Ohio Rev. Code §2929.04(B) recognizes three categories of mitigating factors. It is difficult to argue that there was evidence of mitigating circumstances in the case at bar when incompetency of counsel is the primary issue. At the mitigation hearing the Court appointed two psychiatrists to examine the defendant, but their testimony concerned only insanity. Defense counsel did not raise the issue of provocation as it would relate to Lytle being angry at White, his partner, when White hit Lytle with the baseball bat, but argued that provation existed since Mr. Archibald, the decedant, was actually guilty of gross sexual imposition in propositioning Lytle for a homosexual act. The absurdity of this line of attack, and the repulsiveness, is quite evident. Counsel did not have Dr. Sontag, the defense psychiatrist, re-examine the defendant before the mitigation hearing and even though Sontag was available at the trial and at that hearing, along with the other two psychiatrists, he refused to put them on the stand.

a) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This miti-

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gating factor has not arisen in any reported case; nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, one must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any aggravating specification will preclude the defendant from claiming mercy killing.

b) Ohio Rev. Code §2929.04(B)(2) provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." Mitigating duress and coercion, as applied by the court below is practically worthless. The point is made by State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to expand the definition of duress and coercion by holding that youth and absence of a prior record were relevant considerations. 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then, ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily influenced by his adult companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

In Bell the Court did not even allude to the obvious; that one who is easily led or influenced by another is simply not likely to break the relationship and escape. Neither concept permits the sentencer to make the kind of judgment about compara-

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tive blameworthiness that Woodson and Roberts require.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so one cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances--for example, that the killing was for the purpose of escaping detection--and it is unlikely that "strong" provocation would exist in conjunction with others--for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite (the defendant) into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation as it relates to manslaughter and mitigating provocation as it relates to the death penalty cannot be illuminated.

c) Ohio Rev. Code §2929.04(B)(3) treats as mitigating that the crime "...was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of mitigating mental condition differs in any significant respect from Ohio's case law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding that he was sane, would effectively preclude the defendant from asserting this form of mitigation.

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the

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legislative failure has been rectified by judicial interpretation and application. Ohio's insanity defense is defined as follows:

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969) (syllabus 1). This definition surely suggests no easy differentiation from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in five capital cases. It would unduly prolong this argument to discuss each of the cases in detail. Suffice it to say, therefore, (1) that the Court has read the mitigating condition narrowly by recognizing that it does not cover all mental disorders and by limiting "mental deficiency" to low intelligence or retardation, State v. Bayless 48 Ohio St.2d at 87, 95-6, 357 N.E. 2d at 1046, 1050-51 (thus blurring the distinction between mitigation and exculpation), while, in the very next case, reading the same language expansively to accord the sentencer "the broadest possible latitude" by holding that "any mental state or incapacity may be considered" short of the defense of insanity. State v. Black, 48 Ohio St.2d at 268, 358 N.E.2d at 555-56; (2) that the Court has compounded confusion by explicitly refusing to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," ibid.; (3) that the Court has stated that the defendant's youth is a "primary factor" in determining "mental deficiency" (without indicating how that could possibly be the case), while simultaneously upholding a death sentence imposed on a 16 year old offender, State v. Bell, 48 Ohio St.2d at 270, 282, 358 N.E.2d at 559, 565 (Lytle was 18);

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and (4) that, its expansiveness in State v. Black, supra, notwithstanding, the Court has upheld the death sentence in every case in which mitigating mental condition was raised. See cases cited supra, and State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976).

Taken as a whole, the Court's cases either fail to draw any distinction between mitigation and exculpation, thus rendering mitigation illusory, or so confound matters that the mitigating condition cannot be applied even-handedly as a result of the very gloss that the Court has given it.

d) Ohio Rev. Code §2929.04(B) requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by a preponderance of the evidence. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion, or mental condition; that absence of a prior record is relevant to the determination of duress and coercion, and that duress includes undue domination by another. That these statements are insubstantial (perhaps cosmetic) is indicated by the following: (1) none of the additional factors (youth, etc.) has relevance independent of the statutory factors; (2) in no case has the Court even tried to explain how youth or absence of a record might be relevant to any of the statutory factors; (3) in no case has the Court set aside a death sentence where the defendant was young or had no prior record or acted under the influence of another. Thus, the illusory nature of the statutory factors cannot be overcome by reference to additional factors.

e) It is apparent from the description of Ohio's capital-sentencing system, as interpreted and applied by the Ohio Supreme Court, that the statutory mitigating factors are illusory or

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intolerably narrow at best; that this profound deficiency cannot be remedied by resorting to additional mitigating factors; and that the sentencer in Ohio is therefore precluded from considering matters which, in many other states, would serve to mitigate the death penalty. Because "...the penalty of death is qualitatively different from a sentence of imprisonment, however long...there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra at 2992. Ohio law does not permit a reliable determination of the appropriateness of the death penalty. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, petitioner submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death.

(2) Preclusion of Jury Participation in the Capital-Sentencing Process.

Under Ohio's scheme, issues of aggravation go to the merits. Ohio Rev. Code §2929.03(B) and (C). Consequently, they are, and must be, jury triable. Yet, aggravation and mitigation are, in Ohio, really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following gradations of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized,

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it becomes clear that issues of mitigation actually go to the degree of guilt, with preclusive or mandatory consequences on sentence, and that the issues should be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, it is clear that determining the validity of capital-sentencing statutes crucially involves "ascertaining contemporary standards of decency." Woodson v. North Carolina, supra at 2987. In Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968), this Court, citing the Eighth Amendment case of Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that "...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is controlled. See Gregg v. Georgia, supra at 2933. Ohio's law does not reflect a legislative judgment to the contrary even if such a judgment were permissible. As noted above, the Ohio legislature apparently believed that compliance with Furman precluded jury participation of any sort. That judgment, proved erroneous by Gregg, now raises substantial constitutional questions which should be resolved by this Court.

(3) Unconsitutionality of Allocating Burden of Proof to Defendant. Ohio Rev. Code §§2929.03(E) and 2929.04(B) force the defendant to establish by a preponderance of the evidence one or more of the mitigating factors enumerated in §2929.04(B). State v. Woods, 48 Ohio St.2d at 135, 357 N.E.2d at 1065. The Ohio Supreme Court has summarily upheld the constitutionality of this procedure. State v. Sandra Lockett, 49 Ohio St.2d at 65-66, 358 N.E.2d at

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1074. In In re Winship, 397 U.S. 358 (1970), this Court interpreted the due process clause in a criminal case to require allocation to the prosecution of the burden of proving beyond a reasonable doubt every essential element of guilt. As petitioner has argued before, mitigation does go to the question whether the defendant is guilty of capital murder. Hence, under Winship the state should be required to bear the burden. But the result would be no different even if mitigation were regarded as going solely to punishment, for the reach of the Winship rule was broadened in Mullaney v. Wilbur, 421 U.S. 684 (1975), when this Court invalidated a Maine procedure which placed on the defendant the burden of proving by a preponderance the existence of provocation to reduce murder to manslaughter. Even though provocation was not an element under Maine law, this Court held that Winship was applicable given the disparity in sentences for murder and manslaughter and the consequent importance of reliably determining the applicable category. Id. at 700-01. This Court regarded it as "intolerable," id. at 703, to impose a more severe sentence on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. (Emphasis added.) In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to imprisonment. Under Ohio's burden of proof, a defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, although in a prison. Petitioner respectfully suggests that Ohio's burden of proof raises a most serious constitutional question.

(4) Eighth Amendment Adequacy of Scope of Review of Ohio Supreme Court.

In State v. Bayless, supra at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the

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aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by the following:

a) In State v. Edwards, supra at 47, 358 N.E.2d at 1062, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that "in criminal appeals this court will not retry issues of fact (relating to mitigation). In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict or sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non-capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt, supra at 2966, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida" (emphasis added).

b) In none of the nineteen cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

c) In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors

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broadly for the benefit of the defendant. These expansive readings could hardly have been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced. Especially in the case at bar, when the record is defective due to incompetent counsel, a complete review must occur.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Court.

VII. CONCLUSION

For the foregoing reasons, it is requested that a Writ of Certiorari be issued to review the decision of the Supreme Court of Ohio.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I, James F. Cox, counsel for Petitioner herein, hereby certify that, on the 15th day of April, 1977, I served

a copy of the foregoing Writ of Certiorari, by mailing a copy in a duly addressed envelope, with first class postage prepaid to R. Michael DeWine, Prosecuting Attorney, Greene County, 41 East Main Street, Xenia, Ohio 45385

JAMES E. COX
ATTORNEY FOR PETITIONER

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"APPENDIX "A"

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

-vs- : CASE NO. CA 858

ROBERT PAUL LYTLE :

Defendant-Appellant :

. . . . .

O P I N I O N

Rendered on the 9th day of December, 1975

. . . . .

NICHOLAS A. CARRERA, Greene County Prosecutor, 115 North Whiteman Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

COX AND BRANDABUR, By JAMES F. COX, Of Counsel, Allen Building, Xenia, Ohio 45385
Attorneys for Defendant-Appellant

. . . . .

SHERER, J.

This appeal is from a conviction of aggravated murder and a sentence of death. The appellant was indicted on September 13, 1974 jointly with Charles E. White and David W. Arrasmith and the charge was that they caused the death of Wallace R. Archibald while committing kidnapping or aggravated robbery or while fleeing immediately after committing those offenses. The indictment specified that the offense was committed (1) for the purpose of

escaping detection; (2) while they were committing or attempting to commit kidnapping; and (3) while they were fleeing immediately after committing aggravated robbery.

The State's case established the following facts.

After work on Friday, August 23, 1974, the victim, Mr. Archibald, and some of his co-workers at Wright Patterson Air Force Base went to a restaurant in Dayton to partake of food and drink together in order to celebrate Mr. Archibald's birthday. That same day, appellant, White, and Arrasmith had returned to Xenia to Arrasmith's home from Akron. While Mr. Archibald's birthday party was in progress, appellant and his cohorts embarked upon a burglary spree in Greene County. In one of the burglarized houses, appellant found and stole a .25 calibre Colt automatic pistol.

After the burglaries and the birthday party, Mr. Archibald's and the burglars' paths converged at the Baby Doll Lounge in Dayton. Mr. Archibald struck up an acquaintance with appellant there and, on a pretext, appellant and White enticed Mr. Archibald outside to appellant's car where appellant produced the stolen .25 calibre pistol and, at gunpoint, robbed Mr. Archibald of $44.00. Arrasmith came out then and he and White, using Mr. Archibald's keys tried to get into Mr. Archibald's car. They were unsuccessful and, returning to appellant's car, they then drove away (Arrasmith driving) with appellant holding Mr. Archibald a

prisoner at gunpoint.

Enroute thereafter, Arrasmith stopped several times and told Mr. Archibald to debark, but appellant and White refused to allow him to leave. They drove this way to Simison Road in Green County where Arrasmith stopped the car. Appellant and White force Mr. Archibald to get out; following him. Appellant was carrying the gun and White a baseball bat. They took him to the rear of the car where Arrasmith followed them. Upon being informed that appellant and White intended to kill Mr. Archibald and after remonstrating with them to no avail, Arrasmith returned to the car and, as he was getting in, he observed White slug Mr. Archibald in the back of the head and saw Mr. Archibald fall to the ground.

Arrasmith attempted to drive away but stopped on a command from appellant. Then, with Mr. Archibald lying on his side, White illuminated his head with a flashlight while appellant with the muzzle of the gun very close (12 to 18 inches) to the left side of Mr. Archibald's head, put a bullet into his brain. White and the appellant ran back to the car immediately. White told Arrasmith he should have seen the shooting and gleefully described to Arrasmith how Mr. Archibald's blood spurted into the air out of his head when appellant fired. Mr. Archibald's body was found by Spring Valley policemen at 2:20 A.M. (August 24, 197 while they were on routine patrol and, from the coroner's testimony, Mr. Archibald had been shot and killed shortly

before that time.

On September 9, 1974, appellant was arrested on suspicion of burglary in Perry County and the police there found the .25 calibre pistol which had fired the fatal bullet under the seat of his car. After his return to Greene County, appellant made a statement to the police wherein he admitted shooting Mr. Archibald, but described the shooting as a reflex action triggered by his being hit a glancing blow by the bat after it struck Mr. Archibald and while Mr. Archibald was still standing. However Arrasmith's testimony and the physical evidence flatly contradicted this version. The closeness of the gun, the angle of the bullet in the head, drops of blood around the head on the foliage, and the position of the body definitely established that the victim was lying as found when the gun was fired. Furthermore, the police testified that it was very dark out there and the appellant admitted he saw the blood spurt, thus establishing the method of shooting using the flashlight as set forth above.

After a trial which extended from November 7, 1974 until November 25, 1974, a jury found appellant guilty of aggravated murder and found the presence of all three of the aggravating circumstances set forth in the indictment. After an investigation and a hearing, the Court, not finding the presence of any of the mitigating circumstances set forth in Ohio Revised Code 2929.04(B) to have been proven, sentenced the appellant to death.

The appellant presents five assignments of error, the first of which is that he was denied the effective assistance of counsel which is guaranteed to him by the constitutions of this state and of the United States. Denial of due process is not claimed.

On September 25, 1974, one Larry B. Morris was appointed counsel for appellant by the court and on October 18, 1974, Mr. Morris filed motions to suppress appellant's statements and certain physical evidence. These motions were heard on October 23, 1974 and were overruled. On October 25, 1974, one Rodney D. Keish, filed motions for a change of venue and a continuance on behalf of appellant. At the hearing of these motions on October 29, 1974, Mr. Morris orally requested the court's permission to withdraw as counsel for appellant and permission was granted when appellant represented that he preferred and had retained Mr. Keish as his counsel. The motions were overruled although trial was continued from November 5 to November 7, 1974 because November 5 was election day. Mr. Dennis Sipe was retained as co-counsel by appellant and noted as co-counsel of record at that same time.

Trial did commence on Thursday, November 7, 1974, with Mr. Keish and Mr. Sipe as co-counsel for appellant. Six court days were consumed by the process of selecting a jury; thus the actual trial began on Friday, November 15 with Opening Statements. The presentation of testimony and of various legal arguments

(State's case only since appellant presented no evidence and rested at the conclusion of the State's case) took five more days; from November 15 through November 21, 1974. The defense rested on Friday, November 22, 1974 and the trial was continued until Monday, November 25, 1974 for arguments and instructions. Mr. Keish and Mr. Sipe were both present throughout the entire trial and both took part in the proceedings. The appellant's complaint as to ineffective representation is, however, with Mr. Keish alone.

The claim is that Mr. Keish was incompetent, not that he was unauthorized to practice law in Ohio. If a person has been duly licensed and thus admitted to the practice of law by the Supreme Court, it is presumed that he is competent and, in the absence of clear evidence to the contrary, that he did properly represent the client who retained him during that client's trial on a criminal charge. Vaughn v. Maxwell, 2 Ohio St. 2d 299, State v. Peoples (1971), 28 Ohio App. 2d 162, 57 Ohio Opns. 2d 226. In order to overcome this presumption, it is not sufficient to show "inexperience or unskillfulness, lack of preparation or of interest, incompetency or inadequacy, mistakes or errors of judgment, improper advice or trial strategy in connection with the case." Annotation, 74 A.L.R. 2d 1390, 1399. See also State v. Peoples, supra, and State v. Salyer, No. 732, Clark County Court of Appeals.

The appellant cites a number of federal cases (none by

the Supreme Court) which seem to opt for a finding of something less than normal competency as being sufficient to reverse a conviction, but the law in Ohio is established by the legislature and by the courts of this state, not by Federal intermediate courts, and it is well established that what must be shown in order to overcome the presumption of competency is that the action or inaction of trial counsel resulted in proceedings which were a farce and a mockery of justice. State v. Peoples, supra; State v. Salyer, supra; State v. Cutcher, 17 Ohio App. 2d 107; 74 A.L.R. 2d, supra, (1403); O'Malley v. United States, 285 F. 2d 733 (1961).

In his brief, appellant's counsel (who was appointed for this appeal) claims that Mr. Keish was inexperienced and points out certain actions and inactions of his which counsel avers illustrate his inexperience and which amount to incompetency requiring a reversal. There is no need to set forth and to evaluate each of these claimed infractions inasmuch as we have examined the entire record meticulously and cannot say, even assuming counsel to be correct, that the cited episodes or claimed omissions, either singly or collectively, or anything else done by Mr. Keish, turned the trial into a farce and a mockery of justice. Applying that test, the incidents referred to by counsel, applying hindsight, would show at most some possible mistakes and errors of judgment, but they hardly amount to incompetency let alone providing grounds for a reversal of the conviction.

There is only one claim which bears mentioning specifically and that is that counsel went to trial unprepared and admitted it. This is really an allusion that the court erred in not granting a continuance. The record reveals, however, that Mr. Keish was present with Mr. Morris at the hearing on October 23 and had consulted with the appellant previous to that date although the exact time of his coming into the case is uncertain. Nevertheless the record indicates he had over two weeks before the trial commenced plus the eight days consumed by jury selection within which to prepare. Our examination of the record fails to reveal what more he, or Mr. Sipe, could have done by way of preparation which could have altered his trial strategy or have affected the outcome and present counsel for appellant does not point out to us anything specific in this regard.

Mention is made of two possible witnesses for the defense whom Mr. Keish claimed he did not locate until the last day of the trial, but he did not indicate that they were unavailable, nor did he ask (at the trial) for a short delay in order to get them there. Furthermore, these witnesses did testify at the mitigation of sentencing hearing and, if their testimony at the trial would have been the same, it is difficult to see how it would have affected the outcome thereof. However, from the state of the record, it is possible that said witnesses were deliberately withheld from the trial as a part of strategy and we are without

sufficient knowledge to say that this possible decision was not made or that it would have been incorrect.

In conclusion, appellant has not pointed out anything which Mr. Keish or Mr. Sipe could have done in order to "effectiv overcome the evidence presented against him at the trial." State v. Williams, 19 Ohio App. 2d 234, 239, and we cannot find anything in the conduct of Mr. Keish which would lend merit to this first assignment of error. Accordingly it is overruled.

The second assignment of error claims that the trial court erred in overruling appellant's motions to suppress certain evidence and his confession. The evidence in question was taken from appellant's car in Perry County by the Sheriff of that county At the hearing on these motions on October 23, 1974, a copy of the inventory of the items taken from his car which had been hande to the appellant after the search was introduced into evidence. The appellant then testified, in substance, that he had not been given a copy of the search warrant itself, that he had been arrested on a burglary charge and his car impounded, that his car was searched thereafter and he was shown a piece of paper and told that it was a search warrant. However, a Greene County deputy sheriff testified that there was a copy of the search warrant in appellant's personal effects when he was surrendered to the deputy of the Perry County authorities. The search warrant itself was not used or marked as an Exhibit at that hearing, but it was

conceded that the search was made pursuant to it.

There is a presumption of regularity when a search is made by means of a search warrant. U.S. v. Ventresca, 380 U.S. 102. Appellant did not elicit sufficient evidence to overcome this presumption. His only claim was that he was not served a copy of the warrant. However, the evidence indicated that he was so served if the court believed the deputy sheriff and the court had every right to do so. In any event, we do not believe the lack thereof would vitiate the search. The Rule (Criminal Rule 41(D)) does not require the service of a copy of the warrant before the search but only after any property is taken. This seems to have been done, since appellant had a copy in his possession.

Appellant's argument that his confession was extracted by the use of illegally seized evidence is without merit since he did not show that the evidence was illegally seized.

Most of appellant's argument in his brief on this point has to do with evidence which came out at the trial. It was too late then to object to the evidence on the ground of an illegal seizure. State v. Davis, 1 Ohio St. 2d 28, or on Miranda grounds unless that specific basis for the objection was asserted at the trial. State v. Edgell, 30 Ohio St. 2d 103. Also, appellant had had his opportunity to litigate the legality of the search and the voluntariness of the confession. This assignment of error is

overruled.

In the third assignment of error, appellant claims a violation of the general rule that evidence of the commission of other criminal acts than the one for which a defendant is on trial is inadmissible. He complains about the introduction of evidence concerning the series of burglaries perpetrated in Greene County by him and his accomplices prior to the murder; during the course of which the murder weapon was stolen. This information came in as a part of the relating of appellant's confession and of the testimony of his accomplice, Arrasmith. In addition, the deputy sheriff of Perry County who arrested appellant and found the gun stated that he was arrested on suspicion of burglary.

In the first place, there was no objection to this testimony. There was a general objection at the start to the relating of appellant's confession, but that was all, and some of the testimony came in on cross and there was no request to strike. The appellant thus waived any error and can not now predicate error when the same was not called to the attention of the court. State v. Lancaster (1971), 25 Ohio St. 2d 83.

In the second place the evidence was admissible because part of it was relevant to the proof of the murder and all of it was an inseparable part of the whole deed: the theft of the gun, the murder, the flight to Perry County, the arrest and finding of

the gun there. Wigmore on Evidence, Sec. 218. State v. Ross, 92 Oh. App. 29.

The third assignment of error has no merit and is overruled.

The fourth assignment of error is directed to the court's failure to grant a new trial in the face of claimed violations of the rule of Griffin v. California (380 U.S. 609). Four excerpts from the closing argument (in rebuttal) of the prosecuting attorney are quoted in appellant's brief.

At the time these quoted statements of the prosecutor were made, there was no objection to them. Appellant first raised this point in a written Motion for a New Trial filed on December 9, 1974; after the rendition of the verdict. This Motion was orally argued on December 16, 1974 and a memorandum of law in support of same was filed in the trial court on December 17, 1974. Neither in the written motion, nor in the argument or memorandum did the appellant point out to the court the language of the prosecutor about which he was complaining or where it could be found in the transcript of the proceedings.

In said motion and in the argument thereon, all that was stated to the court was a general averment of a violation of the "right against self-incrimination" and that the prosecutor made "statements to the effect that the defense had not produced any

evidence," respectively, and, in the said memorandum, the appellant contented himself with the citing of two cases; Griffith v California, 380 U.S. 609 and State v. Murphy, 13 Ohio App. 2d 159. Nothing further was written or said in this regard and the court overruled the motion for a new trial.

The overruling of the motion for a new trial in this regard cannot be predicated as error inasmuch as, in the absence of an objection during the trial, none of the grounds for which a new trial may be granted, as they are set forth in Criminal Rule 33(A), were applicable thereto and, even if they were, the alleged errors were not brought to the attention of the court with enough specificity in order to be able to characterize the court's ruling as error. 3 O. Jur. 2d, 467, Section 553. Furthermore, since no objection was made at the trial level and the remarks of the prosecutor did not prevent the appellant from having a fair trial, this court can not now review the matter. 3 O. Jur. 2d 78ff, Sec. 213. State v. Glaros, 170 Ohio St. 471, State v. Lancaster, supra.

In deciding whether the cited remarks of the prosecutor did, or could have, prevented the appellant from having a fair trial, we have reviewed them and the context of their statement and cannot find anything objectionable about them. All of them were fair comments in rebuttal to arguments of the appellant and

none of them rose to the dignity of being direct comments on the failure of appellant, personally, to testify; nor did they invite inferences of guilt to be drawn therefrom. We note also that the court specifically instructed the jury to not consider the fact that appellant did not testify.

Assuming, arguendo, that the said remarks were violation of the rule in Griffin, we believe that they would constitute harmless error beyond a reasonable doubt, and so hold. Chapman v. California, 386 U.S. 18. Thus, the fourth assignment of error is without merit and is overruled.

In the fifth assignment of error, appellant claims that the death penalty and the court costs imposed upon him would amount to cruel and unusual punishment in contravention of the Eighth Amendment to the United States Constitution. There could be no valid argument in this regard if it were not for Furman v. Georgia, 408 U.S. 238, since the Constitution recognizes the existence and validity of the death penalty when it [illegible]ks of a capital crime and of being deprived of life by due process of law in the Fifth Amendment thereof. To say then that the imposition of death is in violation of the Eighth Amendment is to say that the Constitution is self-contradictory in this regard.

However, Furman, supra, held (in sum) that the imposition or withholding of the death penalty as it then was being imposed or withheld in Ohio by the jury's verdict and entirely

at their discretion alone was so devoid of standards and so arbitrary as to make it cruel and unusual because it violated the equal protection guaranteed by the Fourteenth Amendment. Since that decision, the Ohio legislature enacted Ohio Revised Code Sections 2903.01, 2929.02, 2929.03 and 2929.04 under the aegis of which the appellant was charged, convicted, and sentenced. These statutes provide, in pertinent part, as follows:

> "2903.01 AGGRAVATED MURDER.
> ...(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, (or)..., aggravated robbery...
>
> "(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
>
> "2929.02 PENALTIES FOR MURDER.
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code...
>
> "2929.03 IMPOSING SENTENCE FOR A CAPITAL OFFENSE.
> ...(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty

or not guilty verdict on any charge or specification.

"(C)...If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

"(2) By the trial judge, if the offender was tried by jury.

"(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

"(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

"2929.04 CRITERIA FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL OFFENSE.
(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

"...(3) The offense was committed for the purpose of escaping detection,...

"...(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, (or)..., aggravated robbery...

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

This procedure was followed to the letter in this case. The appellant was charged under division (B) of Section 2903.01, there were three criteria for the imposition of death from parts (A)(3) and (A)(7) of Section 2929.04 set forth in the Indictment and found to be proven beyond a reasonable doubt by the jury, and the court specifically found that none of the mitigating circumstances set forth in part (B) of 2929.04 were established by a preponderance of the evidence.

The procedures set up by these statutes and followed

in this case removed the impediment of Furman from the death penalty in Ohio. The uncontrolled discretion was removed by taking the choice from the jury. The arbitrariness was removed by the exact delineation of the acts and their attendant circumstances under which it could be imposed and by making it mandatory unless the judge found the presence of at least one of the mitigating circumstances. Thus, no one's arbitrary discretion is involved and the death penalty is certain once the described acts are committed and it is so found.

We have carefully reviewed the procedure herein and can find no error therein. The fifth assignment of error is not well taken and is overruled.

No argument was set forth in substantiation of the sixth assignment of error which was directed to "other errors manifest upon the record." Therefore, since there is nothing to decide, that assignment of error is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

. . . . .

KERNS, P.J., and McBRIDE, J., concur.

APPENDIX E

Syllabus.

Appellant contends next that due to his economic condition he was denied equal protection of the law. It is obvious from a reading of the statute that this contention is misplaced. The General Assembly, in limiting to two the number of psychologists or psychiatrists the court might appoint, also limited the expert testimony of this nature the court might consider. The statute provides, in effect, that all, including appellant, are entitled to only two witnesses of this category. We are unable to agree that the trial court either abused its discretion or denied any right, including that of equal protection, to the appellant. The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

THE STATE OF OHIO, APPELLEE, *v.* LYTLE, APPELLANT.

[Cite as State v. Lytle (1976), 48 Ohio St. 2d 391.]

Criminal law—Aggravated murder—Imposition of death penalty—Constitutionality—Evidence—Similar acts—Proved, how—Error in admission of testimony harmless, when.

1. When presenting an allegation of ineffective assistance of trial counsel to a reviewing court, an appellant must initially show a substantial violation of an essential duty by that counsel.
2. For the purpose of proving a scheme, plan or system, in a prosecution for aggravated murder with specifications, it is error for the trial court to admit testimony concerning other crimes not inextricably related to the crime charged.
3. Error in the admission of other act testimony is harmless when there is no reasonable possibility that the testimony contributed to the accused's conviction. (Crim. R. 52[A]; *Chapman* v. *California*, 386 U. S. 18.)

Statement of the Case.

4. Ohio's statutory framework for the imposition of capital punishment is a valid constitutional enactment of law and does not violate the Constitution of the United States or of the state of Ohio. (*State* v *Bayless*, 48 Ohio St. 2d 73, approved and followed.)

(No. 76-143—Decided December 27, 1976.)

Appeal from the Court of Appeals for Greene County.

After work on Friday, August 23, 1974, Wallace R. Archibald and several of his co-workers at Wright Patterson Air Force Base drove to a restaurant in Dayton. There the group partook of food and drink in celebration of Archibald's birthday.

On that same day, appellant, Robert P. Lytle, and two companions, Charles E. White and David W. Arrasmith, traveled from Akron to Arrasmith's residence in Xenia. After a brief stay, the three men decided to drive to Dayton. On the way to Dayton the trio burglarized three homes. From one of the burglarized houses appellant stole a .25 caliber Colt automatic pistol.

Later that same evening, after the birthday party was concluded and the burglaries had been committed, both Archibald and the three burglars entered the Baby Doll Lounge in Dayton. Subsequently, Archibald struck up an acquaintance with appellant. On a pretext, appellant enticed Archibald outside into appellant's car where appellant produced the .25 caliber pistol and robbed Archibald of $44. At this point White called Arrasmith out of the bar and the two, using Archibald's keys, attempted unsuccessfully to get into an automobile which Archibald said he owned. It is unclear whether Archibald had outwitted his assailants or was merely too intoxicated to properly identify his own vehicle. All four men then drove off in appellant's car, with Arrasmith at the wheel and appellant holding Archibald a prisoner at gunpoint.

Enroute out of Dayton, Arrasmith stopped the car several times and told Archibald to get out, but White refused to allow him to leave. As they drove along Archibald was told to hand over his watch. Thereafter, White

struck Archibald on the back of the head with a baseball bat because White believed Archibald had tricked them back in the parking lot.

When they reached Simison Road in Greene County, Arrasmith was told to stop. Appellant and White forced Archibald out of his seat and accompanied him to the rear of the car, where Arrasmith followed them. Upon being informed that appellant and White intented to kill Archibald, Arrasmith returned to the car. As he was getting into the car, Arrasmith observed White hit Archibald on the back of the head with a baseball bat, and Archibald then fall to the ground. A short time later Arrasmith heard a single shot. Appellant and White then jumped back into the car and Arrasmith drove away. As they drove, White described the shooting to Arrasmith, relating how Archibald's blood had spurted into the air from the hole in his head, and joked that he, too, would have shot the victim but he "didn't want to waste the bullet."

The trio traveled back to Xenia, stopping once to dispose of the bat. After reaching Arrasmith's residence the group divided up the money. Appellant and White then departed, heading for the Perry County home of White's parents.

On September 9, 1974, appellant was arrested on a charge of suspicion of burglary. Thereafter, the police discovered the .25 caliber pistol under the seat of appellant's car. Appellant subsequently made a statement to the police wherein he admitted shooting the victim, but described the shooting as being triggered by his receiving a glancing blow by the bat after it struck Archibald.

On September 13, 1974, Lytle was indicted for purposely causing the death of Wallace Archibald while committing kidnapping and aggravated robbery, and for the purpose of escaping detection and arrest for the above offenses. Trial was commenced before a jury on November 15, 1974. At that time the state presented Arrasmith as a principal witness. When the state concluded its case the defense rested. On November 25, 1974, the jury rendered its verdict, finding appellant guilty of aggravated murder and the three specifications thereto. After an investigation

and a hearing, the court, finding no mitigating circumstances present, sentenced Robert Lytle to death.

The Court of Appeals overruled all of appellant's assignments of error and affirmed the judgment of the trial court. The cause is now before this court as a matter of right.

Mr. Nicholas A. Carrera, prosecuting attorney, and *Mr. Stephen K. Haller*, for appellee.

Messrs. Cox & Brandabur and *Mr. James F. Cox*, for appellant.

I.

CELEBREZZE, J. In propositions of law Nos. 1, 2 and 3 appellant alleges he was denied a fair trial and substantial justice due to the ineffective assistance of his trial counsel. Appellant's claim should be viewed in the light of an unusual series of events which occurred prior to the date set for trial.

Lytle plead not guilty to all charges on October 2, 1974. On that date he was represented by attorney Larry B. Morris, who had been appointed on September 23, 1974. On October 18, 1974, Morris filed motions to suppress appellant's statements and certain physical evidence. On October 25, 1974, attorney Rodney D. Keish filed motions for a change of venue and a continuance on behalf of the appellant. At the hearing of these motions on October 29, 1974, Morris requested the court's permission to withdraw from the case. Permission was granted when appellant indicated that he preferred Keish as his counsel. Morris, who had spent in excess of 50 hours on the case at that time, agreed to comply with the court's order that he turn over the contents of his case file to Keish.

Summarizing the above, it is apparent that Keish began formal participation in the defense effort on October 25, 1974. From that date, Keish had 13 days before the juror selection process began, and 21 days before the state presented its evidence, to prepare his case. It will also be recalled that Keish had the benefit of more than 50 hours of work put in by his predecessor on the case.

Appellant's present counsel claims that Keish was in-

experienced, and points out certain actions and inactions which counsel now avers illustrate incompetency requiring a reversal. In particular, appellate counsel alleges the following to be errors committed by Keish:

(1) Counsel conveyed to appellant a false impression he could win, thus destroying any chance to plea bargain;

(2) Inadequate investigation by counsel, due primarily to the withdrawal of former counsel nine days prior to *voir dire;*

(3) Counsel did not have a proper grasp of the law, especially in regard to discovery procedure;

(4) Counsel rested without putting on any evidence; and

(5) The closing argument was incompetent because counsel argued defenses without first presenting evidence to support those defenses.

The phrase "effective assistance of counsel" is a term of art. Courts are, generally, reluctant to enunciate specific prophylactic rules of conduct for defense counsel. Beginning with the polestar decision in *Powell* v. *Alabama* (1932), 287 U. S. 45, there has developed a plethora of case authority on the meaning of "effective and substantial aid." *Powell*, at page 53. The "farce, or a mockery of justice" test[1] has gradually been rejected, with the United States Court of Appeals for the Sixth Circuit now requiring that counsel render "reasonably effective assistance." *Beasley* v. *United States* (C. A. 6, 1974), 491 F. 2d 687, 696.

This court has recently announced, in *State* v. *Hester* (1976), 45 Ohio St. 2d 71, 79, that:

"In formulating a test for effective counsel pursuant to the Fifth, Sixth and Fourteenth Amendments, and Sections 10 and 16 of Article I of the Ohio Constitution • • •, we hold the test to be whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done."

In addition, we held that "[a]pplication of the test,

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[1]*Williams* v. *Beto* (C. A. 5, 1965), 354 F. 2d 698, 704. This test can be traced back to *Diggs* v. *Welch* (C. A. D. C., 1945), 148 F. 2d 667, 669, certiorari denied, 325 U. S. 889.

like the application of the exclusionary rule, must be on a case-to-case basis." *Hester* at page 80. We concluded by noting that the Pattern Rules of Court and Code Provisions, based upon the A. B. A. Standards for Criminal Justice by Wilson, for the Committee on Implementation of Standards for the Administration of Criminal Justice, and the A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, and Standards Relating to the Defense Function might be helpful to the trial court in deciding what is fair and adequate representation.

Appellant herein has structured his evaluation of Keish's performance in the light of those A. B. A. standards. Appellant claims that the assistance of his trial counsel did not meet the standards of skill set forth in those pattern rules, and therefore argues that he was denied competent counsel.

Although the A. B. A. standards have been cited in over 4,000 appellate decisions and codified in part in various codes of legal responsibility, they do not constitute the law of this state.*

We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the *best of available practice* in the defense field. There are many attorneys who fail to use the best available practices, yet relatively few who are found to be incompetent.

When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth

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*"The standards themselves—17 volumes and a compendium covering every phase of the criminal trial—were developed over a span of nine years by practicing lawyers, judges, and scholars. The final product is a distillation of what was considered the *best available practice in each stage* of the proceeding—from arrest through post-conviction appeal." (Emphasis added.) Pattern Rules of Court and Code Provisions (Rev. Ed. 1970), at page vi.

Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.

On the issue of counsel's effectiveness, the appellant has the burden of proof, since in Ohio a properly licensed attorney is presumably competent. See *Vaughn* v. *Maxwell* (1965), 2 Ohio St. 2d 299; *State* v. *Williams* (1969), 19 Ohio App. 2d 234.

On the issue of prejudice, there is no Ohio precedent, and the federal courts are in disagreement as to who must bear the burden of proof.[3] The weight of authority places the initial burden upon the appellant since "[u]nlike a constitutional violation actually caused by the state, such as an illegal search and seizure or a coerced confession, ineffective assistance of counsel is a result of the volitional acts of one charged with representing the defendant. To impose automatically the initial burden of proof on the state * * * would penalize the prosecution for acts over which it can have no control." *McQueen* v. *Swenson* (C. A. 8, 1974), 498 F. 2d 207, 218.

In the case at bar we find it unnecessary to determine upon whom lies the burden of proving prejudice, since we hold that appellant has not established that his counsel was ineffective. Specifically, we note the record reveals that appellant had decided to exercise his constitutional right to a trial on the charges in the indictment prior to the time when Keish replaced Morris. Appellant does not here contend that Morris was incompetent.

We also disagree with appellant's contention that his trial counsel did not conduct an adequate investigation, and that Keish was unfamiliar with the discovery procedure. First of all, the appellant chose Keish to be his advocate, despite the fact that Morris had been appointed by the court and had expended a considerable amount of time in structuring a defense. Upon his resignation from the

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[3]Compare *Coles* v. *Peyton* (C. A. 4, 1968), 389 F. 2d 224, certiorari denied, 393 U. S. 849; and *United States* v. *DeCoster* (C. A. D. C., 1973), 487 F. 2d 1197 (burden on the government) with *United States, ex rel. Green,* v. *Rundle* (C. A. 3, 1970), 434 F. 2d 1112, and *McQueen* v. *Swenson* (C. A. 8, 1974), 498 F. 2d 207 (burden on appellant).

defense effort Morris delivered his case file to Keish. Morris had conducted the usual discovery to that date, and thereafter Keish conferred with appellant concerning the case. Keish also filed a motion for a bill of particulars, and subsequently spent a day investigating the events surrounding appellant's arrest. We conclude that the charge of inadequate preparation is without foundation.

Appellant has argued that it was error for the defense to rest without putting on any evidence. We note that appellant had the benefit of a presumption of innocence. Appellant had the opportunity to be a witness in his own defense, but chose to exercise the constitutional privilege against self-incrimination. There is no indication in the record, nor does appellant's present counsel offer any suggestion, as to what evidence, if any, could have been presented at trial on appellant's behalf.

Finally, we find no fault with trial counsel's closing argument. At that time Keish attempted to argue the defense of accident, claiming that appellant had been inadvertently struck by the baseball bat. The following excerpt from the record illustrates that Keish did his best to establish this defense while cross-examining the state's key witness, David Arrasmith.

"Q. I want you to think real hard about this. When you got back to your house, did Lytle complain to you at all or did he show you a bump on the side of his head? Think hard on it.

"A. Not that I can remember.

"Q. And you don't remember touching his head?

"A. Yes, I think I remember that.

"Q. To feel the bump?

"A. Yes, I think he said he almost shot Charlie.

"Q. And was that because Charlie hit him upside the head with the baseball bat?

"A. I don't know if he hit him or not, but that's what he said."

Accordingly, we reject appellant's contention that he was denied a fair trial and substantial justice due to the quality of the assistance rendered by his trial counsel.

II.

In his propositions of law Nos. 4, 5, 6 and 7, appellant argues that the trial court erred in overruling his motion to suppress evidence obtained during a search af his vehicle. At the time it was seized, Lytle's automobile was parked on a public roadway, in front of a house belonging to the parents of Charles White. Appellant first claims that the subsequent search was illegal because no search warrant was issued before the vehicle was seized. It is not disputed that a warrant was issued after the car was impounded, and no search was conducted until after the warrant was obtained.

Beginning with *Carrol* v. *United States* (1925), 267 U. S. 132, there has developed a line of decisions establishing that less stringent warrant requirements apply to the search and seizure of an automobile, as opposed to the search of private residences or offices. A factor underlying this development has been the exigent circumstances that exist in connection with movable vehicles. "* * * [T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." *Chambers* v. *Maroney* (1970), 399 U. S. 42, 50.

When considering whether the lack of a warrant to seize a vehicle invalidates a later search pursuant to a warrant, we believe the *Chambers* case to be dispositive. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers*, at page 52. Appellant does not contend, and we are unable to conclude, that there was a lack of probable cause to search his vehicle. There existed a distinct possibility that a friend or relative of co-defendant White would remove the vehicle, or tamper with its contents. Because the same considerations of exigency and immobilization apply here, as

they did in *Chambers*, we reject proposition of law No. 4.

Appellant next argues, in the alternative, that evidence obtained during the search of his vehicle should be excluded since the search violated the Fourth Amendment proscription against general exploratory searches. The warrant here involved specified that the affiant sought to recover 102 packages of cigarettes, a pair of field glasses, an electric calculator and $200 in change taken from a juke box and a cigarette vending machine. The offenses which purportedly gave rise to the appellant's possession of these goods were the breaking and entering of a laundromat and a high school. However, the inventory listing the property seized discloses that although none of the specified items were found, the officers seized two baseball bats, a .25 caliber Colt pistol and an assortment of tools, including chisels, crowbars and a hacksaw.

We believe that the searching officers could reasonably have believed that the items seized were either the "fruits of crime" (the baseball bats), or "weapons or other things by means of which a crime has been committed or reasonably appears about to be committed" (the tools and the pistol). See Crim. R. 41(B). We therefore reject appellant's proposition of law No. 5.

In his proposition of law No. 6, appellant claims that the Greene County authorities improperly obtained the .25 caliber Colt pistol in violation of the directives in Crim. R. 41(D), since Perry County authorities delivered the murder weapon to Greene County authorities to use as evidence in the prosecution for murder. Crim. R. 41(D) provides, in pertinent part: "* * * Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant."

We believe the last sentence of Crim. R. 41(D) was intended to insure that the property seized under a warrant is not destroyed or otherwise misused. Appellant cites no authority which would support his narrow interpretation of the rule, and we feel that both policy and practical considerations militate against such an interpretation. We thus find no merit in this proposition.

and until the accused gives evidence of his good character. Although character is not irrelevant, the danger of prejudice outweighs the probative value of such evidence. The danger of prejudice is at its highest when character is shown by other criminal acts, and hence the rule that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some purpose other than to show a probability that the individual committed the crime on trial because he is a man of criminal character. See McCormick on Evidence 447 (2d Ed.), Section 190.

In Ohio, the purposes for which evidence of other criminal acts may be offered are enumerated in R. C. 2945.59. That section provides as follows:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

In discussing the application of R. C. 2945.59, this court noted, in *State* v. *Burson* (1974), 38 Ohio St. 2d 157, at page 158, that "* * * evidence of other acts of a defendant is admissible *only* when it 'tends to show' one of the matters enumerated in the statute and *only* when it is relevant to proof of the guilt of the defendant of the offense in question."

The present appeal concerns appellant's conviction on the charge of aggravated murder while committing kidnapping and aggravated robbery, and thus the question is whether the prosecution's "other acts" testimony tended to prove motive, intent, absence of mistake or accident, or scheme, plan or method, in committing the above-stated offense. The state argued, and the appellate court so held, that the testimony relating the burglaries was ad-

In proposition of law No. 7, appellant re-argues a factual dispute. It is his contention that a Perry County deputy sheriff seized his automobile in Muskingum County. He then concludes that the deputy was outside the territorial jurisdiction of the Perry County court which issued the search warrant.

The record reveals that the seizure was made in Roseville, a town which straddles the Perry County—Muskingum County line. In addition, the seizure was made before the search warrant was issued, due to the presence of exigent circumstances. It is not disputed that when the vehicle was searched it was within Perry County. We therefore reject this proposition of law.

III.

In his proposition of law No. 8, appellant asserts that the trial court erred in overruling his motion to suppress the statement in which he confessed to the murder of Wallace Archibald. We have already determined that there was no illegality in the seizure and subsequent search of appellant's automobile. Accordingly, we reject appellant's contention that the confession should have been ruled inadmissible as the "fruit" of this search.

IV.

In proposition of law No. 9, it is argued that the trial court erred by allowing into evidence testimony relating prior bad acts or crimes committed by the appellant. Specifically, the trial court admitted in evidence a confession by the appellant and testimony by Arrasmith which contained references to burglaries and breaking and entering offenses allegedly perpetrated by the appellant and his accomplices on the day of the murder.

The appellate court ruled that the above evidence was admissible because it was relevant to and an inseparable part of the sequence of events; the burglaries, the theft of the .25 caliber pistol, the murder, the flight to Perry County, the subsequent arrest and discovery of the gun. On this point we disagree with the appellate court decision.

Generally, the prosecution is forbidden to introduce initially evidence of the accused's bad character, unless

missible in that it tended to show appellant's scheme, plan or system.

In *State* v. *Curry* (1975), 43 Ohio St. 2d 66, this court had occasion to construe the "scheme, plan or system" language of R. C. 2945.59. The first of two general factual situations set out in *Curry* is comparable to the case at bar, that being the situation in which the "other acts" form part of the immediate background of the crime charged in the indictment. We held, at page 73, that "[i]n such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category * * * the 'other acts' testimony must concern events which are *inextricably related to the alleged criminal act.*" (Emphasis added.)

That situation is not present in this case. We believe that it would have been possible to prove that the appellant committed the aggravated murder without introducing testimony disclosing the burglaries. Because the "other acts" were not inextricably related to the crime charged in the indictment the lower court erred in admitting such testimony.

We consider then whether this error requires the reversal of the guilty verdict, or whether it may be termed harmless. In order to hold error harmless, this court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State* v. *Abrams* (1974), 39 Ohio St. 2d 53; *Chapman* v. *California* (1967), 386 U. S. 18.

In this appeal, we have reviewed a confession by appellant, in which he admits to having shot the victim in the head. At trial, testimony was given by David Arrasmith, an accomplice of appellant at the time of the murder. That testimony was substantially similar to appellant's confession, with Arrasmith giving a detailed account of how appellant kidnapped Archibald, took $44 from him at gunpoint, and subsequently shot him in the head on a desolate country road.

Upon consideration of the above evidence we believe it most unlikely that the "other act" testimony contributed in any noticeable degree to appellant's conviction for

the purposeful killing of Archibald. At worst, the testimony established that the appellant had stolen the murder weapon. We therefore find no reasonable possibility that the improperly-admitted "other act" testimony contributed to the appellant's conviction, and hold that the error committed was harmless beyond a reasonable doubt. In addition, we note that there was no objection or request to strike by trial counsel at the time this disputed testimony was elicited. Accordingly, proposition of law No. 9 is overruled.

V.

In his proposition of law No. 10 appellant asserts that the prosecutor's closing argument was improper under the rule formulated in *Griffin* v. *California* (1965), 380 U. S. 609, in that certain comments had the effect of penalizing appellant for exercising his Fifth Amendment privilege against self-incrimination.

We find no fault with the state's closing argument. The comments by the prosecution did not focus attention on the silence of the appellant, but rather reminded the jury that the state's case had not been rebutted. Moreover, the trial court instructed the jury that appellant's failure to testify should not be considered for any purpose. Therefore this proposition of law is without merit.

VI.

In his final proposition of law, No. 11, appellant characterizes the death penalty as cruel and unusual punishment, and thus in violation of the Eighth and Fourteenth Amendments to the United States Constitution. We have determined, in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, that Ohio's capital punishment legislation is constitutional, and hence we disregard this last contention.

VII.

No error prejudicial to the appellant having been found, we hereby affirm the judgment of the Court of Appeals.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

Baldwin Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 76 *TERM*

To wit: December 27, 1976

State of Ohio
Appellee,

vs.

Robert Paul Lytle,
Appellant.

No. 76-143

APPEAL FROM THE COURT OF APPEALS

for Greene *County*

This cause, here on appeal from the Court of Appeals for Greene *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed;* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 28th day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It it further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Greene County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the ..... *appellee* ..... *recover from the* ..... *appellant* ..... its ..... *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT ..... *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* GREENE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... *day of* ..... *19* .....

..... *Clerk*

..... *Deputy*

Baskett Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 76 TERM

To wit: December 27, 1976

State of Ohio,
Appellee,

vs.

Robert Paul Lytle,
Appellant.

No. 76-143

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of GREENE, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Monday, February 28, 1977.

THOMAS STARTZMAN,
Clerk

..... *19*.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $..... *Paid by* Affidavit of Poverty

Docket Fee . . . . . $..... *Paid by*.....

Docket Fee . . . . . $..... *Paid by*.....

Printing Record . . . . . $..... *Paid by*.....

Supplemental Record . . $..... *Paid by*.....

Sheriff's Costs . . . . . $..... *Paid by*.....

Sheriff's Costs . . . . . $..... *Paid by*.....

5

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1977 TERM

To wit: January 20, 1977

The State of Ohio,
Appellee,

vs.

Robert Paul Lytle,
Appellant.

No. 76-143

REHEARING

GREENE COUNTY

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this.....day of..... 19.....

.....*Clerk.*

By.....*Deputy.*

S A1

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

State of Ohio,
Appellee,

To wit: January 20, 1977

No. 76-143

vs.

Robert Paul Lytle,
Appellant.

E N T R Y

(GREENE COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William O'Neill

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 20th day of January 19 77

THOMAS L. STARTZMAN *Clerk.*

By .....Deputy.

HOMICIDE

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC § 2903.01 (116 v 116), repealed 134 v H 511, § 3, Eff 1-1-74.

The effective date of H 511 is set by section 4 of the act.

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.01 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511. Eff 1-1-74.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderence of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. Eff 1-1-74.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. Eff 1-1-74.

AMENDMENT [VIII]

[PUNISHMENT FOR CRIME]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§ 2945.59 Proof of defendant's motive. (GC § 13444-19)

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

HISTORY: GC § 13444-19; 119 v 123 (129), ch 28, § 10. Eff 10-1-53.

AMENDMENT [IV]

[SEARCHES AND SEIZURES]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V]

[RIGHTS OF PERSONS]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

[RIGHTS OF ACCUSED]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT [XIV]

[RIGHTS OF CITIZENS]

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6575

ROBERT PAUL LYTLE, Petitioner

-vs-

THE STATE OF OHIO, Respondent

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. MICHAEL DEWINE
Prosecuting Attorney

WILLIAM F. SCHENCK
Assistant Prosecuting Attorney

STEPHEN K. HALLER
Assistant Prosecuting Attorney
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-6575

ROBERT PAUL LYTLE, Petitioner

-vs-

THE STATE OF OHIO, Respondent

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent opposes issuance of a Writ of Certiorari in the within cause, for the reasons that the Petitioner has not exhausted his available state remedies and that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this court.

I. OPINIONS BELOW

The Petition of the Petitioner correctly cites the opinions below.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTIONS PRESENTED

1. Whether this court should grant jurisdiction where the Petitioner has not exhausted his available state remedies.

2. Whether the Ohio test or standard of competency of counsel in a criminal case is violative of the Sixth and Fourteenth Amendments of the United States Constitution.

3. Whether this court should decide federal questions raised here for the first time on review of state court decisions where Petitioner failed to raise or preserve such questions in the state courts.

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Greene County
Courthouse
Xenia, Ohio 45385

4. Whether a search of the Defendant's car, pursuant to a search warrant, was contrary to the Fourth Amendment of the United States Constitution.

5. Whether the Ohio death penalty structure violates the Eighth or Fourteenth Amendments to the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS

1. This case involves the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law: Ohio Revised Code, Sections 2929.02, 2929.03, 2929.04, 2945.59, 2953.21, 2953.22, 2953.23, and Ohio Rule of Criminal Procedure 41. These sections are set out in full in Appendix A-J.

V. STATEMENT OF THE CASE

On September 13, 1974, Robert Paul Lytle, along with Charles Ellsworth White and David Wesley Arrasmith, were indicted for purposely causing the death of Wallace R. Archibald, while committing kidnapping or aggravated robbery, or while fleeing immediately after committing the above said offenses. The Grand Jury further found and specified that the offense was committed for the prupose of escaping detection; the offense was committed while the offender was committing, or attempting to commit the crime of kidnapping; and the offense was committed while the offender was fleeing immediately after committing aggravated robbery, contrary to Section 2903.01 of the Ohio Revised Code.

Lytle pled not guilty to all charges on October 2, 1974. On that date, he was represented by attorney Larry B. Morris, who had been appointed on September 23, 1974.

On October 23, 1974, defense counsel was heard on a Motion to Suppress all statements made by the Defendant. Mr. Morris also moved the Court to suppress evidence found in a search of Defendant car. Mr. Rodney Keish, Attorney at Law, was also present at the defense table.

After hearing testimony, the court overruled both motions.

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On October 29, 1974, the Court heard the Defendant's Motion for a Change of Venue, Bill of Particulars, and continuance. These three (3) Motions were filed by Mr. Keish with the consent of the Defendant. At this time, Mr. Morris requested the Court's permission to withdraw from the case (R. 5). After determining that the Defendant wanted Mr. Keish to represent him, the Court granted the request of Mr. Morris (R. 18). Dennis L. Sipe was also approved as co-counsel (R. 26). Morris, who had spent in excess of fifty hours on the case at that time, agreed to comply with the Court's order that he turn over the contents of his case file to Keish. At the hearing, it was noted that Mr. Keish had filed a Writ of Mandamus with the Court of Appeals to compel the County Sheriff to allow him to see the Defendant (R. 14). The Court granted the Motion for a Bill of Particulars, (R. 21), granted a two day continuance (R. 26), and overruled the Motion for a Change of Venue (R. 23).

After a week of voir dire, the Jury Trial commenced on November 15, 1974. At the end of the State's case, on November 22, 1974, the State rested. On November 25, 1974, the Jury returned a verdict of "Guilty" to the crime charged and all three specifications on the indictment.

On December 16, 1974, Motions by Mr. Keish for aquittal and a new trial were denied.

January 6, 1975, pursuant to Ohio Revised Code, Section 2929.03 (D), a hearing was held to determine if any mitigating circumstances existed. After hearing the report of two Court appointed psychiatrists, the Adult Probation Department, Defense witnesses, and Counsel's arguments, the Court found that the mitigating circumstances of the Ohio Revised Code, Section 2929.04 (B) were not present. Defendant was thereafter sentenced to the electric chair (R. 64-65).

A timely appeal was brought by a new Court appointed attorney, James F. Cox. The Court of Appeals considered all assignments of error, and affirmed the lower Court's decision. Thereupon, a timely Notice of Appeal was filed by appointed Counsel in the Supreme Court of Ohio.

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The Ohio Supreme Court rendered judgment in this matter affirming the lower court's decision on December 27, 1976. Rehearing was denied on January 20, 1977.

After the Ohio Supreme Court decided the case of State V. Lytle, 48 Ohio St. 2d 391, (1976), the Petitioner-Defendant requested, and was granted, a post-conviction hearing by the Common Pleas trial court, pursuant to Section 2953.21, et. sec., of the Ohio Revised Code. An extensive hearing was held, and the trial court filed a decision on March 29, 1977, denying the Defendant's motion for post-conviction relief. (Appendix A).

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VI. ARGUMENT

1. WHETHER THIS COURT SHOULD GRANT CERTIORARI WHERE THE PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE REMEDIES.

In its Statement Of The Case, Petitioner has conveniently left out the following facts: After the Ohio Supreme Court decided the case of State v. Lytle, supra, the Petitioner-Defendant was granted a post-conviction hearing by the original trial court, pursuant to Section 2953.21 et sec., of the Ohio Revised Code (Appendix E). The sole issue involved in the post-conviction hearing was the question of incompetency of trial counsel under the Sixth Amendment.

This court has stated that it should only review final judgments of the highest available state courts. Costarelli v. Massachusetts, 421 U.S. 193, 196 (1975), Republic Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948), Gorman v. Washington University, 316 U.S. 98, 100, 101 (1942).

Under Ohio law, the Defendant may appeal the denial of post-conviction relief to the Ohio Court of Appeals pursuant to Ohio Revised Code, Section 2953.23 (B) (Appendix E). A decision to the Ohio Court of Appeals may be appealed further to the State Supreme Court on the post-conviction denial, State v. Hester, 45 Ohio St. 2d 71, 341 N.E. 2d, 304 (1976), State v. Duling, 21 Ohio St. 2d 13, 254, N.E. 2d 670 (1970).

Respondent wishes to bring to this court's attention the fact that at this time the Petitioner has a right under Ohio law to appeal the decision denying him post-conviction relief. Specifically, the judgment entry in this case was filed on May 13, 1977, (Appendix B). Pursuant to Ohio Revised Code, Section 2953.05 (Appendix F), Petitioner has thirty days within which to file his appeal for denial of post-conviction relief. At this time, Respondent has no indication of whether Petitioner-Defendant intends to file this appeal. It is possible, however, if Petitioner does bring a timely appeal that this court would be in the position of deciding whether to intervene in a pending state proceeding.

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It is clear that there is further appellate review possible in the Ohio courts on the issue of competency of counsel which is not separable from the other issues in this case. The reviewing court will be able to examine the extensive record made during the hearing. Ohio Revised Code, Section 2953.23 (B).

This court can only review final judgments rendered "by the highest court of a state in which a decision could be had". 28 U.S.C. 1257. Respondent respectfully submits that because this jurisdictional requirement has not been met, this court should not grant a Writ of Certiorari.

2. WHETHER THE OHIO TEST OR STANDARD OF COMPETENCY OF COUNSEL IN A CRIMINAL CASE IS VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Questions one and two argued by the Petitioner actually present one issue: Whether the Ohio Supreme Court's standard or test of competency of counsel in a criminal case is constitutional. In State v. Hester, supra, the Ohio Supreme Court stated that:

> In formulating a test for effective counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments and Sections 10 and 16 of Article I of the Ohio Constitution . . . we hold the test to be whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done. (Hester at 79).

Respondent wishes to bring to this Court's attention the fact that the Hester court formulated its test for effective counsel in accord with the decisions reached in the landmark case of Powell v. Alabama, 287 U.S. 45 (1932) and also Beasley v. United States, 491 F 2d 687 (6th Cir,) 1974. (Hester at 77-78).

The phrase "effective assistance of counsel" is a term of art. Courts are generally reluctant to enunciate specific prophylactic rules of conduct for defense counsel. Beginning with the often cited decision in Powell v. Alabama, supra, there has developed a plethora of case authority on the meaning of "effective and substantial aid . . ." Powell, pg. 53. The "farce or mockery of justice" test, Williams v. Beto, 354 F. 2d 698, (1965), had gradually been rejected in Ohio with the United States Court of Appeals for the Sixth Circuit now requiring that counsel

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render "reasonably effective assistance", Beasley v. United States, supra, pg. 696.

In State v. Lytle, supra, the Ohio Supreme Court held that the Petitioner had not established that his trial counsel was ineffective within the guidelines set out in Hester.

In response to Petitioner's third question, Respondent further contends that Petitioner was not denied his right to effective assistance of counsel under either the Hester or Beasley standard. It should be noted that at the post-conviction relief hearing, the Petitioner did not bring forth any new evidence which could have been placed before the trial court. Petitioner's attorney was therefore not ineffective in this crucial aspect. Counsel also filed all of the procedural motions usually made in a criminal trial. At the hearing for post-conviction relief the court found the fact that the Defendant rested without producing evidence was a trial tactic which counsel and the Defendant had discussed. (Appendix A).

It should be remembered that when a Defendant rests without presenting any witnesses, he receives the benefit of the presumption of innocence. The burden of proof has not been shifted. If he, through his chosen counsel, decides not to present any witnesses, and to rest on the presumption accorded to him by law, it is submitted that he cannot complain that the tactic did not work.

3. WHETHER THIS COURT SHOULD DECIDE FEDERAL QUESTIONS RAISED HERE FOR THE FIRST TIME ON REVIEW OF STATE COURT DECISIONS WHERE PETITIONER FAILED TO RAISE OR PRESERVE SUCH QUESTIONS IN THE STATE COURTS.

It is well settled principle of law that if a State Court does no more than discuss the interpretation of a State statute, without considering such interpretation in light of a federal question properly presented to it, the Supreme Court cannot consider the federal points. Beck v. Washington, 269 U.S. 541, 549 550 (1962). Respondent contends that it is clear that nowhere in the proceedings below has the Petitioner raised a federal question regarding the trial court's erroneous admission into evidence of the "like and similar act" testimony pursuant to Ohio Revised Code,

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Section 2945.59 (Appendix G).

In Cardinale v. Louisiana, 394 U.S. 437 (1969), the Court stated, "It was very early established that the court will not decide federal constitutional questions raised here for the first time on review of state court decisions, " 294 U.S. at 348. This position has been reaffirmed numerous times by simply stating as the court did in Tacon v. Arizona, 410 U.S. 351, 353 (1973), "We cannot decide issues raised for the first time here".

Respondent brings this issue to the court's attention for the reason that it feels that granting review based on the question presented in the Petitioner's fourth question would only result in this court's dismissing the case for granting certiorari improvidently once a review of the record was made. Attached hereto as Appendix H is a complete list of the assignments of error and propositions of law properly raised by the Petitioner in the state courts.

The issues raised here by the Petitioner in the fourth question, although not raised or preserved in the courts below, has been ruled upon by the United States Supreme Court in the case of State v. Hahn, 50 O. App. 178, appeal dismissed 305 U.S. 557 (1938), motion to certify overruled 133 O. St. 446, where the case was dismissed for lack of a substantial federal question.

It has been held that Ohio Revised Code, Section 2945.59, is merely expressive of the common law and is a rule of evidence and not a rule of the substantive law. State v. Pack, 18 O. App. 2d 76, 47 O.O. 2d 113 (1968). The Pack court cited State v. Hahn in holding the statute to be constitutional.

Respondent further contends that the State Supreme Court was correct in finding that the error committed by the trial court in admitting such testimony did not affect any substantial rights under 28 U.S.C. 2111 under the "reasonable doubt" test of Chapman v. California, 386 U.S. 18 (1968). In State v. Lytle, supra, the court held that the error committed, looked at in the light of the other evidence, particularly Petitioner's confession, was harmless beyond a reasonable doubt, Lytle at 403-404. The Respondent respectfully submits that this court should not raise this evidentiary question to a level of constitutional import.

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Where a federal question is raised before the court for the first time on review of state decisions, it is submitted that this court should not decide that issue.

4. WHETHER A SEARCH OF THE DEFENDANT'S CAR, PURSUANT TO A SEARCH WARRANT, WAS CONTRARY TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner argues that the evidence obtained during the search of his vehicle should be excluded, since the search violated the Fourth Amendment perscription against general exploratory searches. The search warrant involved in this case specified that the affiant sought to recover one hundred two (102) packages of cigarettes, a pair of field glasses, an electric calculator, and two hundred dollars ($200.00) in change taken from a juke box and a cigarette vending machine. The offenses which gave rise to the Appellant's possession of these goods were the breaking and entering of a laundermat and a high school. The inventory listing the property seized discloses that although none of the specified items were found, the officers seized two (2) baseball bats, a .25 Colt pistol and an assortment of tools, including chisels, crowbars and a hacksaw.

The Ohio Supreme Court found that the searching officers could reasonably have believed that the items seized or either the "fruits of a crime" (the baseball bats) or "weapons or other things by means of which a crime has been committed or reasonably appears about to be committed" (the tools and the pistol). The Ohio Supreme Court's decision was based on Ohio Criminal Rule 41 (B) (See Appendix I) State v. Lytle, supra, pg. 400.

Ohio Criminal Rule 41 (B)(1) authorized the issuance of a warrant for the seizure of any evidence of a crime. Petitioner appears to be arguing for a return of the Mere Evidence Rule. This one-time rule represented the constitutional doctrine limiting seizures of evidence to contraband in the fruits of and tools used to commit a crime. The basis of the Mere Evidence Rule was that the constitution protected property interests, and in items that had merely evidentiary value, the property interest of the owner was superior to that of the state. In items that were subject to

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seizure, the Defendant had either never obtained a valid interest in the property, (the fruits of a crime) or could never obtain a legally recognizable interest in the property (contraband) or had lost the superior interest because the items were used to commit a crime (tools). The rule was the subject of extensive criticism and frequently circumvented. The rule was finally abandoned by this court in Warden v. Hayden, 387 U.S. 294 (1967), on the theory that the constitution protects privacy and not property, and privacy is not disturbed more by a search for mere evidence than one for other property.

The Ohio court, subsequent to Warden v. Hayden, supra, made it clear that the Mere Evidence Rule was no longer applicable, at least to warrantless searches, State v. Phillips, 27 Ohio St. 2d 294 (1971), State v. Woodall, 16 O. Misc. 226 (1968). Both Phillips and Woodall involve searches incident to arrest. In a case involving a valid search warrant for a .38 revolver, a .38 shell, found in the course of a search which failed to disclose the gun itself, was admitted into evidence. The Court of Appeals stated that this situation was governed by Warden v. Hayden, supra; State v. Fields, 29 Ohio App. 2d 154, (1971).

The results of these cases indicate that although a search warrant in Ohio cannot justify an intrusion to look for mere evidence, if the initial intrusion was proper (eg. pursuant to a valid search warrant as in the instant case) mere evidence uncovered during the search was admissible. It is clear that objects in plain view of a police officer who has a right to be in the position where he is (eg. pursuant to a valid search warrant) are subject to seizure, and may be introduced into evidence, if the evidence is found to be relevant to a material issue.

5. WHETHER THE OHIO DEATH PENALTY STRUCTURE VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue presented by Petitioners is whether Ohio's statutory scheme, which imposes the death penalty, is constitutional in light of this court's most recent pronouncements on capital punishment as it relates to the Eighth Amendment. Respondent respectfully submits that Ohio law conforms with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

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Following the decision in Furman v. Georgia, 408 U.S. 238, (1972), Ohio adopted Revised Code, Section 2929.02 (Appendix D) which prescribes the death penalty, or life imprisonment for a crime of aggravated murder. The procedure for determining whether the death sentence is to be imposed is set out in Revised Code, Section 2929.03 and Section 2929.04 (Appendix D). Those statutes permit the death penalty only where one or more aggravating factors is specified in the indictment and proved beyond a reasonable doubt. The aggravating circumstances include: Assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to, or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

The trier of fact may be either a jury, or if waived, a three judge panel. First the trier of fact is to consider whether the Defendant is guilty of the charge and, if found guilty, whether he is also guilty of one or more of the specifications, a sentence of life imprisonment is imposed and possibly a fine. If the Defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or the three judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty. A pre-sentence investigation and a psychiatric examination are required to be made before the hearing, and other evidence and testimony may be submitted, including any statements by the Defendant. The death penalty is to be imposed if the trial judge or the three judge panel, unanimously finds that none of three possible mitigating factors has been established to exist by a preponderance of the evidence.

The mitigating factors are that: 1) The victim of the offense induced or facilitated it; 2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and 3) The offense was primarily the product of the offender's psychosis or mental deficiency, although such condition is insufficient to establish the defense of insanity.

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Essentially, it may be seen that the Ohio statutes provide for a bifurcated trial in which the issues of guilt as to the charge, and of certain statutory defined aggravating circumstances, are determined by the jury or, if waived, by a three judge panel, and the issues of mitigation are determined by the trial judge, or by the three judge panel. If the sentence of death is affirmed by a court of appeals, a further appeal, as a matter or right, may be taken to the Ohio Supreme Court, as provided by Section 2 (B)(2)(a)(ii) Article IV of the Ohio Constitution (Appendix J).

The Ohio statutory scheme differs somewhat from any of those considered by the United States Supreme Court in its July 2, 1976 decisions, but it is basically similar to the Georgia, Florida and Texas statutes, which the court found to be constitutional. Each of those statutes provide for a bifurcated trial, with a separate sentencing hearing to consider information relevant to the imposition of sentence under standards to guide the sentencing authority in the use of that information. The statutes in North Carolina and Louisana, which were struck down, imposed mandatory death sentences, with no "particularized consideration of relevant aspects of the character and record of each convicted Defendant before the imposition upon him of the sentence of death". Woodson v. North Carolina, 49 L. Ed. 2d 944 (1976). The Ohio statutory scheme provides the framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

It cannot be fairly charged that Ohio statutes are likely to result in capriciousness, arbitrary and discriminatory death sentences. More clearly than any of the states whose statutes were reviewed by the high court, Ohio has attempted to insulate the determination of guilt and of sentence from any likelihood of jury arbitrariness. The jury is directed to determine only guilt or innocence and whether the Defendant is guilty beyond a reasonable doubt of one or more aggravating factors specified in the indictment. Their responsibility is virtually the same as in any other criminal trial. The explicit nature of the specifications allows effective judicial review of whether the jury's verdict was supported by the evidence.

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Gregg v. Georgia, 49 L. Ed. 2d 859 (1976), specifically decided that the concerns expressed in Furman v. Georgia, supra, are adequately met and, as a general proposition, best met by a "system that provides a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information", Gregg v. Georgia, supra, at pg. 887. Ohio conforms to this description quite closely. Sentence is determined at a separate hearing, and only after the pre-sentence investigation and a psychiatric examination. Testimony and other evidence may also be submitted at this hearing. On the basis of this information, and considering the nature and circumstances of the offense, and the history, character and condition of the offender, the trial judge or the three judge panel are then to determine whether one or more of the three (3) statutory mitigating factors have been proved by a preponderance of the evidence.

The mitigating factors may require judicial interpretation and clarification, but they are basically reasonable and similar to those approved in Profitt v. Florida, 49 L. Ed. 2d, 913 (1976), and they do clearly guide the sentencing judge or judges in their decision. The Ohio Supreme Court independently reviews the aggravating and mitigating circumstances presented by the facts of each case to assure itself that capital sentences are fairly imposed by Ohio's trial judges. State v. Bayless, 48 O.St. 2d 73, 86 (1976).

Under the Supreme Court's decisions in Gregg v. Georgia, supra, Ohio's statutory framework for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment.

VII. CONCLUSION

In summary, it is respectfully submitted that the court should deny a Writ of Certiorari in this case for three reasons. First, the Petitioner has not yet exhausted his state remedies on the question of incompetency of trial counsel. Secondly, Petitioners have failed to raise or preserve issues involving

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federal questions in the state courts. Thirdly, the Supreme Court of Ohio correctly decided the federal questions involved in accord with the decisions of this court. Accordingly, Respondent respectfully asks this court to deny the Writ of Certiorari in this case.

Respectfully submitted,

Greene County Prosecuting Attorney
308 Greene County Court House
Xenia, Ohio 45385

BY: Michael DeWine
MICHAEL DEWINE
Prosecuting Attorney

and

BY: William F. Schenck
WILLIAM F. SCHENCK
Assistant Prosecuting Attorney

and

BY: Stephen K. Haller
STEPHEN K. HALLER
Assistant Prosecuting Attorney

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Michael DeWine, counsel for Respondent herein, hereby certify that, on the 26 day of May, 1977, I served a copy of the foregoing Brief in Opposition of Certiorari, by mailing a copy in a duly addressed envelope, with first class postage prepaid to James F. Cox, Attorney for Petitioner, Allen Building, Xenia, Ohio 45385.

Michael DeWine
Counsel for Respondent

MICHAEL DEWINE
Prosecuting Attorney
Greene County
Courthouse
Xenia, Ohio 45385

APPENDIX "A"

FILED

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IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

THE STATE OF OHIO	:	
PLAINTIFF,	:	CASE NO. 74-CR-149
-vs-	:	
ROBERT PAUL LYTLE	:	FINDINGS OF FACT, CONCLUSIONS
DEFENDANT.	:	OF LAW, AND DECISION

Aultman, J.
Rendered this 29th day of March, 1977.

The Defendant, Robert Paul Lytle, is before this Court upon a verified Petition filed pursuant to Section 2953.21, et. sec., of the Ohio Revised Code, seeking post-conviction relief from his previously imposed conviction and death sentence for the crime of aggravated murder.

The Petitioner claims he was denied his Constitutional rights during the presentation of his case on the following grounds:

1. He was denied the effective right to counsel as guaranteed by Section 10, Article I of the Ohio Constitution and the Sixth Amendment of the United States Constitution.

2. He was denied due process of law as guaranteed by Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, such that,

a. The Court erroneously allowed

Certified to be a true copy of the original filed March 29, 1977
Certified this 16 day of March 19 77
Clerk of Courts
Greene County Ohio

into evidence prior bad acts or crimes by the Defendant unrelated to the offense in issue constitution prejudicial error pursuant to Ohio Revised Code Section 2945.49, and,

b. The Court committed other prejudicial errors as spread upon the record.

Petitioner demanded that the Court, upon hearing, stay the execution and that the Court vacate the sentence heretofore imposed upon him.

Thereupon, this Court took additional testimony during a hearing held pursuant to Mr. Lytle's claim for post-conviction relief. During this hearing, Rodney Keish and Larry B. Morris, both of whom formerly represented Defendant Lytle, gave testimony, as did Nicholas Carrera, who represented the State of Ohio. Mr. Lytle also testified at this hearing. At the conclusion of the testimony, the State and Petitioner filed Memoranda in support of their contentions.

Therefore, from a consideration of all the evidence adduced, and the Memoranda filed, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court finds that Rodney Keish, upon examination, represented that he was not adequately prepared to go to trial; that he did convey an impression to the Defendant that he could win the case; that he did tell the Defendant that the death penalty

was on the way out and that his choices in the matter essentially were (1) to plead guilty and get a life sentence; (2) stand trial and possibly get off altogether; (3) have the charge reduced and get life imprisonment since the death penalty was of no real concern.

The Court finds that the Defendant, Robert Paul Lytle, did not testify at the original trial of this matter upon the reliance of the representations of counsel, Mr. Keish, and that his case was rested with the presumption of innocence.

The Court finds that any purported plea bargain discussions, which might have taken place between former counsel, Larry Morris, and Prosecutor Carrera, were withdrawn at the time Mr. Keish began representing Mr. Lytle.

The Court finds that any purported defense, which Mr. Lytle may have had at the time of trial, was brought out, not by direct testimony from witnesses, but upon cross-examination of the State's witnesses, the introduction into evidence of the Defendant's statement, and the closing argument of counsel for the Defendant.

CONCLUSIONS OF LAW

As to the basic question as to whether the Defendant was denied the right to counsel as guaranteed by Federal and State Constitutions. The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances, including the fact that he had retained

counsel, had a fair trial and substantial justice was done. On these issues, the Defendant has the burden of proof.

Therefore, the Court finds on this issue in favor of the State of Ohio, since a properly licensed attorney, in the State of Ohio, is presumed to be competent.

The Court further finds, as a matter of law, that the issues which the Defendant Lytle seeks to raise by post-conviction relief, were fully and unsuccessfully litigated in the Appellate and Supreme Courts of this State.

As to the alleged ineffectiveness, and it's application to the matter of plea bargaining, This Court finds, as a matter of law, that to reverse or modify a decision arrived at through the deliberations of a jury, there must be a substantial violation of defense counsel's essential duties to his client, and this Court finds no evidence of same.

Further, the burden is on the Defendant to show that he was prejudiced by the failure of a plea bargain, and the Court finds, as a matter of law, that the Defendant has failed to sustain this burden.

The Court further finds, as a matter of law, that the evidence adduced in this post-conviction hearing, has failed to disclose any new facts which would indicate that the Defendant did not have a fair trial. The fact that Defendant rested without producing evidence was a trial tactic which counsel and Defendant discussed and the jury had the benefit of the contention of the

Defendant on the question of accident as evidenced by the cross-examination of the witness, David Arrasmith, the introduction into evidence of the statement of the Defendant, and the closing argument of Mr. Keish.

O P I N I O N

Therefore, in light of the above Findings of Fact and Conclusions of Law, IT IS THE OPINION OF THIS COURT that the Motion for post-conviction relief should be DENIED and OVERRULED.

Counsel may prepare proper Entry in conformity with this Opinion.

APPENDIX "B"

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ALICE KLENTZMAN, CLERK
COMMON PLEAS COURT
GREENE COUNTY

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO, *
Plaintiff * Case No. 74 CR 149
-vs- *
ROBERT PAUL LYTLE, *
Defendant * JUDGMENT ENTRY

* *

This matter came on for hearing on the 26th day of January, 1977, upon the Defendant's verified Petition filed pursuant to Section 2953.21, et sec., of the Ohio Revised Code, seeking post-conviction relief from his previously imposed conviction and death sentence for the crime of Aggravated Murder. The Defendant appeared in open Court, along with his attorneys James F. Cox and David W. Cox. The State of Ohio was represented by Prosecuting Attorney Michael DeWine, Assistant Prosecuting Attorney William F. Schenck, and Assistant Prosecuting Attorney Stephen K. Haller.

The matter proceeded to hearing on the 27th day of January, 1977, and continued on the 7th day of February, 1977. The defense called as witnesses Rodney Keish, Larry B. Morris, Dr. Lester Sontag, Dennis Sipe, and the Defendant Robert Paul Lytle. The State of Ohio called as witness former Prosecutor Nicholas A. Carrera.

At the conclusion of all the testimony, both the State and the Petitioner filed Memoranda in Support of their contentions.

Based upon the evidence, it is the opinion of the Court that the Motion for Post-Conviction Relief should be, and hereby is, denied and overruled.

Costs of the action are to be paid by the Defendant.

IT IS SO ORDERED.

JUDGE DAN M. ALTIMAN

Certified to be a true copy of the original filed May 13, 1977
Certified this 18 day of May, 1977
Greene County Ohio
Deputy Clerk of Courts

D:mld
3/77

Michael DeWine
Prosecuting Attorney

PROSECUTING ATTORNEY
Greene County
Xenia, Ohio 45385

James F. Cox
Attorney for Defendant

APPENDIX "C"

IN THE COURT OF COMMON PLEAS, GREENE COUNTY, OHIO

State of Ohio
PLAINTIFF

-vs-

Robert Paul Lytle
DEFENDANT

CASE NO. 74 CR 149

PETITION

Now comes the petitioner, Robert Paul Lytle, who brings this action pursuant to Ohio Revised Code, Section 2953.21 to 2953.24.

Petitioner is a prisoner in the Lucasville Correctional Institute having been found guilty upon trial, as charged, in an indictment for the crime of aggravated murder and sentenced to die in the electric chair by the trial Judge on the 6th day of January, 1975.

Petitioner claims that he was denied his constitutional rights during the presentation of this case in that:

(1) He was denied the effective right to counsel as guaranteed by Section 10, Article I of the Ohio Constitution and the Sixth Amendment of the United States Constitution;

(2) He was denied due process of law as guaranteed by Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, such that,

(a) the court erroneously allowed into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue constituting prejudicial error pursuant to Ohio Revised Code, Section 2945.59, and

(b) the Court committed other prejudicial errors as spread upon the record.

Petitioner alleges that the judgment entered against him was void under the provisions of the Ohio and United States Constitution.

WHEREFORE, petitioner demands that the Court stay execution of the judgment against him pursuant to Ohio Revised Code, Section 2953.21 (H); that this Court cause notice of the filing of this petition to be served on the County Prosecutor and that he be granted a hearing as provided by Ohio Revised Code, Section 2953.21 and that upon hearing, the judgment and sentence, be vacated and held for naught.

COX & BRANDABUR

BY: James P. Cox
Attorney for Defendant
Allen Building
Xenia, Ohio 45385
Telephone: 372-6921

STATE OF OHIO
SS:
GREENE COUNTY

ROBERT PAUL LYTLE, being first duly sworn, says that he is the defendant herein; that he has read the foregoing petition and that the allegation and statements therein are true as he verily believes.

Robert Paul Lytle
ROBERT PAUL LYTLE

Sworn to before me and subscribed in my presence this 10 day of APRIL, 1975.

Johnny Farmer
NOTARY PUBLIC JOHNNY FARMER
NOTARY PUBLIC, SCIOTO COUNTY, OHIO
MY COMMISSION EXPIRES APRIL 1, 1976

JC/rh

COX & BRANDABUR
ATTORNEYS AT LAW
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"dangerous offender," used in connection with determining sentences, eligibility for probation, and eligibility for early release on parole.

In general, repeat offenders are those with a history of persistent criminal activity and who appear to be bad risks for the future. A person is prima facie a repeat offender if he has served time on a prior conviction and is convicted of a second offense of violence, second sex offense, or second theft offense, or is convicted of a third felony, or of a fourth offense of any kind or degree (other than a minor misdemeanor, intoxication offense, or traffic offense).

"Dangerous offenders" are those who have committed an offense, whose history, character and condition reveal them as dangerous, and whose conduct shows a pattern of repetitive, compulsive, or aggressive behavior without thought for the consequences. The term "dangerous offender" equates with "psychopathic offender."

Transition — capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

Research Aids

21 AmJur2d: Criminal Law §§ 525 to 615

ALR

Effect of delay in taking defendant into custody after conviction and sentence. 98 ALR2d 687.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d 1292.

Notice of application or intention to correct error in judgment entry in criminal cases. 14 ALR2d 224.

Racial discrimination in punishment for crime. 40 ALR3d 227.

Voluntary absence of accused when sentence is pronounced. 6 ALR2d 997.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence. 9 ALR3d 462.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section establishes the penalty for aggravated murder as life imprisonment or death, plus an optional fine of up to $25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of $15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

Research Aids

27 OJur2d Homicide §§ 202.1, 202.2
40 AmJur2d: Homicide §§ 552-557

ALR

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 ALR3d 926.

Propriety of general sentence [illegible] several counts in information or indictment [illegible] in aggregate the sentences which might have been imposed cumulatively under the several counts. 91 ALR2d 511.

CASE NOTES AND OAG

1. The decision of the U. S. Supreme Court in Furman v. Georgia compels the Ohio supreme court to modify death sentences imposed under [former] RC § 2901.01, reducing them to life imprisonment, but not to set aside first degree murder convictions, or to

invalidate the indictment: Vargas v. Metzger, 35 OS (2d) 116, 64 OO(2d) 70, 298 NE(2d) 600 (1973).

2. The infliction of any death penalty under the existing law of Ohio is now unconstitutional. State v. Leigh, 31 OS(2d) 97, 60 OO(2d) 80, 285 NE(2d) 333 (1972).

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511, Eff 1-1-74.

Committee Comment

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by

the defendant, represent partial exceptions to the rules of evidence).

See Committee Notes re "Transition" following RC § 2929.04.

Research Aids

40 AmJur2d: Homicide §§ 552-557

ALR

Beliefs regarding capital punishment as disqualifying juror in capital case—Post Witherspoon Cases. 39 ALR3d 550.

Law Review

Confessions of guilt; necessity of additional evidence. (Case note.) 7 OSLJ 440.

CASE NOTES AND OAG

See case notes under RC § 2929.02.

1. The state must prove the material elements of the crime of murder in the first degree, including premeditation and deliberation, beyond a reasonable doubt, in order to resolve the degree issue in the hearing under [former] RC § 2945.06: State v. Taylor, 30 OApp(2d) 252, 59 OO(2d) 398, 285 NE(2d) 89.

2. Where a person charged with an offense punishable by death under GC § 12400 (RC § 2901.01) elects to be tried by a three-judge court under this section, the rule in respect to granting or witholding mercy is the same as that in effect when trial by jury is had, since the judges under this section "have power to decide all questions of fact and law" and may "extend mercy and reduce the punishment . . . in like manner as upon recommendation of mercy by a jury." In such cases the exercise of power of the judges to grant or withhold mercy given by this section and GC § 12400 (former RC § 2901.01) rests soley within their sound discretion in the light of the facts and circumstances disclosed by the evidence: State v. Lucear, 93 App 281, 51 OO 39, 109 NE(2d) 39.

3. Under this section a three-judge court has the jurisdiction, under a plea of guilty to a charge of murder while attempting to perpetrate a robbery, to decide the case and sentence the defendant without a waiver in writing as contemplated by GC § 13442-4 (former RC § 2945.05): State ex rel Scott v. Alvis, 62 OLA 241, 107 NE(2d) 211 (App).

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

municipal corporation. Like proceedings shall be had in such higher court at the hearing of the appeal as in the review of other criminal cases. The clerk of the court rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney general, or solicitor, shall make a transcript of the docket and journal entries in such case, and transmit it with all bills of exceptions, papers, and files in the case, to such higher court.

HISTORY: GC § 13459-14; 113 v 123 (214), ch.55, § 14; 116 v 104 (119), § 2. Eff 10-1-53. Analogous to former GC § 13764.

[POST-CONVICTION DETERMINATION OF CONSTITUTIONAL RIGHTS]

§ 2953.21 Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.-041 [2311.04.1] of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.

HISTORY: 131 v 684 (Eff 7-21-65); 132 v H 742, § 1. Eff 12-9-67.

§ 2953.22 Hearing.

If a hearing is granted pursuant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend such hearing. Testimony of the prisoner or other witnesses may be offered by deposition.

If the petitioner is in a penal institution he may be returned for such hearing upon the warrant of the court of common pleas of the county where the hearing is to be held. The approval of the governor on such warrant shall not be required. The warrant shall be directed to the sheriff of the county in which the hearing is to be held. When a copy thereof is presented to the warden of the penitentiary, the superintendent of a state reformatory, or other head of a state penal institution, he shall deliver the convict to the sheriff who shall convey him to such county. For removing and returning such convict the sheriff shall receive the fees allowed for conveying convicts to the penitentiary.

HISTORY: 132 v H 742, § 1. Eff 12-9-67.

§ 2953.23 Appeal.

(A) Whether a hearing is or is not held, the court may, in its discretion and for good cause shown, entertain a second petition or successive petitions for similar relief on behalf of the

petitioner based upon the same facts or on newly discovered evidence.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

HISTORY: 132 v H 742, § 1. Eff 12-9-67.

§ 2953.24 Repealed, 136 v H 164, § 2 [132 v H 742]. Eff 1-13-76.

§ 2953.31 [Definition.]

As used in sections 2953.31 to 2953.36 of the Revised Code, "first offender" means anyone who has once been convicted of an offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they shall be counted as one conviction.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.32 [Expungement of record of conviction.]

(A) A first offender may apply to the sentencing court if convicted in the state of Ohio or to a court of common pleas if convicted in another jurisdiction for the expungement of the record of his conviction, at the expiration of three years if convicted of a felony, or at the expiration of one year if convicted of a misdemeanor, after his final discharge.

(B) Upon the filing of such application, the court shall set a date for hearing and shall notify the prosecuting attorney of the hearing on the application. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county where the applicant resides to make such inquiries and written reports as the court requires concerning the applicant.

(C) If the court finds that the applicant is a first offender, that there is no criminal proceeding against him, that his rehabilitation has been attained to the satisfaction of the court, and that the expungement of the record of his conviction is consistent with the public interest, the court shall order all official records pertaining to such case sealed and all index references deleted. The proceedings in such case shall be deemed not to have occurred and the conviction of the person subject thereof shall be expunged, except that upon conviction of a subsequent offense, the sealed record of prior conviction may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code. Upon the filing of an application under this section, the applicant shall, unless he is indigent, pay a fee of fifty dollars. The court shall pay thirty dollars of such fee into the state treasury; and twenty dollars into the county general revenue fund if the expunged conviction was under a state statute, or into the general revenue fund of the municipal corporation involved if the expunged conviction was under a municipal ordinance.

(D) Inspection of the records included in the order may be made only by any law enforcement officer, prosecuting attorney, city solicitor, or their assistants, for purposes of determining whether the nature and character of the offense with which a person is to be charged would be affected by virtue of such persons having previously been convicted of a crime or upon application by the person who is the subject of the records and only to such persons named in his application. When the nature and character of the offense with which a person is to be charged would be affected by such information, it may be used for the purpose of charging the person with an offense.

(E) In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of expungement was previously issued pursuant to sections 2953.31 to 2953.36 of the Revised Code.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.33 [All rights and privileges restored.]

(A) An order of expungement of the record of conviction restores the person subject thereof to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.

(B) In any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry, except as provided in division (E) of section 2953.32 of the Revised Code, a person may be questioned only with respect to convictions not expunged, unless the question bears a direct and substantial relationship to the position for which the person is being considered.

HISTORY: 135 v S 5. Eff 1-1-74.

§ 2953.34 [First offender may still take appeal or seek relief.]

Nothing in sections 2953.31 to 2953.33 of the Revised Code precludes a first offender from taking an appeal or seeking any relief

appeal and not by habeas corpus: State ex rel Bednarik v. Alvis, 74 OLA 258, 140 NE(2d) 59 (App).

26. The provision in GC § 13459-3 (RC § 2953.04) requiring the briefs and assignments of error to be filed with the transcript is mandatory, and a motion to dismiss the appeal will be sustained for failure to comply with this requirement: State v. Watson, 74 OLA 28, 139 NE(2d) 63 (App).

27. This section is not jurisdictional and the provisions thereof as to the filing of brief by appellant is directory only, resting the matter of filing brief in criminal cases within the sound discretion of the appellate court, in the exercise of which the court may grant additional time to file such brief: State v. Brunswick, 56 OLA 207, 91 NE(2d) 553 (App).

28. The dismissal of an appeal for failure to file with the transcript a brief containing the assignments of error relied upon is proper in view of the mandatory requirement of this section: Columbus v. Balzan, 38 OLA 141, 49 NE(2d) 592 (App); State v. Barber, 44 OLA 381 (App); State v. Davis, 47 OLA 415 (App).

29. Failure to comply with the mandatory provisions of this section by filing the brief with the transcript is ground for dismissal of the appeal: State v. Smith, 33 OLA 612.

30. A motion to dismiss an appeal filed by defendant in a criminal case, on the ground that briefs were not filed within the time prescribed by this section, will not be sustained: State v. Jones, 33 OLA 330, 34 NE(2d) 990.

31. Where in an appeal in a criminal case, the appellant fails to file a brief with the transcript of the record in the court of appeals, that court should affirm the judgment where no error appears of record, in view of the provisions of this section, requiring prompt consideration of proceedings to review criminal case: State v. Link, 28 OLA 101.

§ 2953.05 Appeals.

Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence in felony cases, whichever is the latter. Appeals from judgments or final orders as above defined in magistrate courts shall be taken within ten days of such judgment or final order. After the expiration of the thirty day period or ten day period as above provided, such appeal may be taken only by leave of the court to which the appeal is taken. An appeal may be taken to the supreme court by giving notice as provided by law and rule of such court within thirty days from the journalization of a judgment or final order of the court of appeals in all cases as provided by law.

HISTORY: GC § 13459-4; 113 v 123 (212), ch 38, § 4; 116 v 104 (117), § 2; 128 v 141. Eff 1-1-60.

Comment: See related Crim. R. 32 (A) (2).

Law Review

Legislative changes in procedural matters and appeals. Judge Lee E. Skeel. 33 OBar (No. 22) 625.

CASE NOTES AND OAG

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1. Revised Code §§ 2953.02 to 2953.14, inclusive, do not provide for an appeal on behalf of the state from the action of a trial judge in granting a defendant's motion for a new trial: State v. Huntsman, 18 OS(2d) 206, 47 OO(2d) 440, 249 NE(2d) 40 (1969).

2. An indigent appellant is not required to show probable error to overcome the presumption of regularity of the proceedings under which he was sentenced where his notice of appeal was delivered timely to prison official but not forwarded to court of appeals: State v. Webb, 11 OS(2d) 60, 40 OO(2d) 66, 227 NE(2d) 625.

3. After a defendant's conviction of the crime of sodomy under RC § 2905.44, and before sentence, his referral by a court of competent jurisdiction to an approved state facility for observation for a period of not more than sixty days as provided by RC § 2947.25, is not a final appealable order but a procedural incident, and in accordance with RC § 2953.05, any appeal must await and follow the imposition of sentence: State v. Thomas, 175 OS 563, 26 OO(2d) 253, 197 NE(2d) 197.

4. This section limits the time for such appeal by referring to "after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence," all indicating the general assembly was contemplating appeals by defendants and not by the state: Toledo v. Crews, 174 OS 253, 255, 22 OO(2d) 290, 188 NE(2d) 592.

5. General Code §§ 13445-1 and 13459-4 (RC §§ 2945.65 and 2953.05), are in pari materia, and where, in a criminal case, the trial court overrules a motion for a new trial filed by a convicted accused, the journalization of such overruling must be contemporaneous with or subsequent to the journalization of the judgment of sentence of such accused; any other journalization of the overruling is a nullity: State v. Nickles, 159 OS 353, 50 OO 322, 112 NE(2d) 531.

6. The allowance by a trial court of the prosecution's motion to nolle prosequi, made and allowed before the selection of a jury has commenced, is not a judgment or final order and, in the absence of an abuse of discretion, is not appealable: Columbus v. Stires, 9 OApp(2d) 315, 38 OO(2d) 377, 224 NE(2d) 369.

7. An appeal from a final order of the court in a criminal case must be taken within ten days of the judgment (sentence), or within ten days of the overruling of motion for new trial, if filed, or within ten days of an order suspending the imposition of sentence and placing the defendant on probation, whichever is the later: Cleveland v. Gunn, 8 OApp(2d) 301, 37 OO(2d) 310, 221 NE(2d) 714.

8. An attempted appeal to the court of appeals will be dismissed for want of jurisdiction, where the

poses to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than three days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to claim such alibi. Notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi.

HISTORY: GC § 13444-20; 113 v 125 (190), ch.23, § 20. Eff 10-1-53.

Comment: This section is superseded by Crim. R. 12.1.

Law Review

Use of judge's discretion and constitutionality of the Ohio "alibi statute." Case note. 24 OSLJ 693.

CASE NOTES AND OAG

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1. The privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses: Williams v. Florida, 399 US 78, 53 OO (2d) 53, 26 LEd(2d) 446, 90 SCt 1893.

2. Where defense counsel's failure to investigate and introduce evidence establishing an alibi has denied the accused the effective assistance of counsel, a conviction will be reversed: Johns v. Perini, 462 F(2d) 1308, 66 OO(2d) 69 (1972).

3. Where it appears that the prosecuting attorney had no objection to defendant's testimony about his employment, but he vigorously opposed any attempt to buttress the claims of alibi by employment records or other means, and it is not clear whether defense counsel made a tactical decision not to introduce the documentary evidence or whether he was precluded from doing so because he had neglected to give notice of intention to rely upon an alibi, a writ of habeas corpus will be issued: Johns v. Perini, 440 F(2d) 577, 59 OO(2d) 71.

4. Language in alibi instructions directing the jury to **acquit if all the evidence in the case raises a reasonable doubt of guilt** does not erroneously shift the burden of proof from the state where other language in the charge clearly explains that the burden remains upon the state: State v. Childs, 14 OS(2d) 56, 43 OO(2d) 119, 236 NE(2d) 545.

5. This section protects the state against false and fraudulent claims of alibi often presented by accused near close of trial: State v. Thayer, 124 OS 1, 176 NE 656.

6. A verdict of guilty will not be disturbed where no abuse of discretion appears in the trial court excluding testimony offered by the accused for purpose of proving an alibi, no notice of which has been given the state: State v. Nooks, 123 OS 190, 174 NE 743.

7. The failure of the trial court, in a criminal case, to charge the jury on the law regarding alibi is not prejudicial to the defendant, where no request for such an instruction was made and the testimony of defendant's alibi witnesses, even if belived by the jury, would not necessarily preclude his involvement in the offense charged or establish the defense of alibi: State v. Goode, 118 App 479, 25 OO(2d) 395, 195 NE(2d) 581.

8. This section is mandatory in its terms, and a defendant who proposes to claim an alibi as a defense is required to file and serve on the prosecuting attorney written notice thereof: State v. Payne, 104 App 410, 5 OO(2d) 87, 149 NE(2d) 583.

9. It is prejudiciously erroneous for the prosecutor in a criminal case to comment upon a notice that evidence would be offered to prove an alibi under this section, when such notice has not been filed with the papers and has not been offered in evidence, and no evidence is proffered of such alibi: State v. Cocco, 73 App 182, 28 OO 283, 55 NE(2d) 430 [appeal dismissed, 142 OS 276].

10. Charge on presumption of innocence and reasonable doubt is not sufficient to cover issue of alibi and refusal to charge on alibi, when requested, was error: McGoon v. State, 39 App 212, 177 NE 238.

11. This section, providing for three days notice before trial by the accused if he is going to produce evidence of an alibi and leaving it within the sound discretion of the trial court to admit such evidence if this section is not complied with is constitutional: State v. Cunningham, 89 OLA 206, 185 NE(2d) 327 (App).

12. The right of one accused of crime to testify in his own behalf is not a constitutional right, but is a right given to him by statute, and the legislature was clothed with authority to limit and regulate such right at the time it enacted this section: Smetana v. State, 22 OLA 165.

13. Oral notice to prosecutor that defendant intends to prove an alibi does not comply with this section: Balzhiser v. State, 35 OLR 120.

14. As to the sufficiency of a notice under this section, see Woodruff v. State, 31 OLR 540.

§ 2945.59 Proof of defendant's motive. (GC § 13444-19)

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

HISTORY: GC § 13444-19; 113 v 125 (190), ch.23, § 19. Eff 10-1-53.

Comment: See related Crim. R. 16(B) (1) (b). See also RC §§ 2901.21 and 2901.22.

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Evidence of criminal history in Ohio criminal prosecutions. Editorial note. 15 WestResLRev 772.

Proof of other crime. (Case note.) 5 OSLJ 232.

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APPENDIX "H"

PETITIONER'S BRIEF BEFORE THE STATE SUPREME COURT

ASSIGNMENT OF ERROR

The Court erred in that:

3. The Court erred in allowing into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue, constituting prejudicial error pursuant to the Ohio Revised Code, Section 2945.59.

Note: The Ohio Rule of Criminal Procedure 41 was attached to this brief as an Appendix, but was not of reproducible quality. The same holds true for Article IV, Section 1 & 2 of the Ohio Code Supplement.